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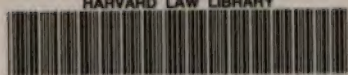
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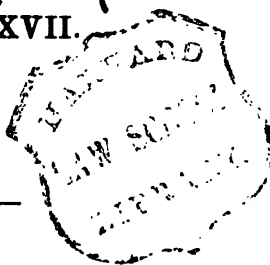
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Jul-26

PRACTICE REPORTS
IN THE
S U P R E M E C O U R T
AND
C O U R T O F A P P E A L S
OF THE
STATE OF NEW-YORK.

By NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW-YORK.

VOLUME XXVII.



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PRACTICE REPORTS.

SUPREME COURT.

JOHN W. NELSON agt. EDWIN INGERSOLL.

The code (§272,) requiring a referee to state the facts found by him and his conclusions of law separately, does not require any further findings upon the *facts* than such as *enter into and form the basis of the judgment* rendered by him. He is not required to negative in express terms any other facts. Facts not found are necessarily negated by implication.

Thus, if the defendant fails to establish his defence or counter claim, the referee, in finding for the plaintiff, negatives the defence or counter claim by *implication*. He is not required to find upon the facts of such defence or counter claim specially, or take any notice in his report of the issues raised thereby.

A referee cannot be required or allowed to make any new findings, either of law or fact, after he has decided the cause and delivered his report. He can then only settle a case which will contain the proceedings had upon the trial, with the request to find upon matters of law and fact, with the *exceptions* taken to his decision after the report is made and delivered. If his finding upon the facts will not sustain his conclusions of law, his judgment based thereupon, with or without a case, upon the report itself, must be reversed.

Monroe General Term, March, 1864.

Present, JAMES C. SMITH, HENRY WELLES and E. DARWIN SMITH, Justices.

THE facts sufficiently appear in the opinion.

By the court. E. DARWIN SMITH, J. The referee having found for the plaintiff, and failed to make any particular finding of fact or law upon the defence and counter claim set up by the defendant, the defendant moved at special term to send back the report to the referee, with directions to specify in his report the facts and law found by him in respect to the matters set up as a defence and counter claim. This motion being denied at special term,

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the defendant has appealed from the order denying such motion to the general term. It was claimed at special term, and is now urged upon this appeal, that the defendant having given evidence before the referee tending to establish his counter claim, the referee was bound to find upon such evidence how far the defence and counter claim was established, or what facts tending to establish them were proved. The argument is, that the provision of the Code (§272) requiring the referee to state the facts found by him, and his conclusions of law thereon separately, and the provision of rule 32, requiring such findings to be contained in the report of the referee, the report does not comply with the provisions of the Code and the rule, and should therefore be sent back for amendment. The mistake in this argument, in my opinion, is, that § 272 of the Code requiring the referee to state the facts found by him, and his conclusions of law separately, does not require any further finding upon the facts than such as enter into and form the basis of the judgment rendered by him. He is to state his findings upon such affirmative facts as are essential to the judgment or to sustain his conclusions of law. The referee, in deciding a case tried by him, finds certain facts established, and upon such facts he states his conclusions of law and renders judgment accordingly. He is not required, I think, to negative in express terms any other facts. Facts not found are necessarily negated by implication. In finding the facts which he deemed established, and which he makes the basis of the judgment rendered by him, he necessarily finds that the facts alleged and attempted to be proved in hostility or in defence to the claim sought to be established by such facts, were not proved or satisfactorily established. If, for instance, the plaintiff fails to make out to the satisfaction of the referee the cause of action set out in his complaint, the referee finds no facts affirmatively, he simply dismisses the complaint. So, if the defendant fails to establish his defence or counter claim,

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the referee, in finding for the plaintiff, negatives the defence or counter claim by implication. He is not required to find upon the facts of such defence or counter claim specially, or take any notice in his report of the issues raised thereby. (11 *Howard*, 92; 30 *Barb.*, 15; § 272.) And rule 32, in requiring the referee to report the facts found, and the conclusions of law separately, meant nothing more than this: Any other construction would impose a very unnecessary and unreasonable burden upon courts and referees. If the referee erred in his finding upon the facts, his report will be reviewed, and a new trial granted upon the same ground and principles which apply to jury trials where the verdict is against the evidence or against the weight of the evidence.

But it is urged by counsel that the referee must state the facts established by the defendant in support of his defence or counter claim, to facilitate and preserve his right of review in respect to the decisions of the referee. This, I think, is a mistake; section 272 of the Code requiring the referee to state the facts found by him and the law separately, was designed to assimilate the trial before referees to trials at the circuit as far as practicable. As the referee acts both in the place of the jury and the court, it required him to state his conclusions upon the facts, such as would be found by the jury on a trial at the circuit, and his findings upon the law separately, as if such decision or proposition of law were so stated by a circuit judge in his charge to the jury. In both forms of trial all the parties have the same right of objection and exception to the proceedings on the trial, and are limited for the purposes of the review of such proceedings to the objections and exceptions then taken; but as the referee does not ordinarily announce his determination upon the whole case at the trial, so that exceptions can then be taken to his final decisions upon the case, the statute (§ 268 and 272 of the Code) gives a right of exception afterwards. This gives the same right

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of exception to the decision upon the law by the referee, as if the same propositions of law were stated to the jury in the charge of the circuit judge. The parties have the same rights to request the referee to hold or decide in a particular way upon questions of law that would exist upon a trial at the circuit, and the further right to request him, as he performs the functions of a jury, to find upon the facts in any way desired. For the refusal of the referee or judge to find, as requested, upon the law or the fact, an exception lies as upon the decision of a circuit judge overruling a defence or counter claim, or refusing to submit a particular question of fact to the jury, and this is the proper way to preserve the rights of the parties upon questions of fact not found by the referee. (*Vide Morse agt. Grant*, 22 N.Y., 325.) Upon all questions of law the point should be also raised and presented to the referee before the decision of the case. The referee cannot be required or allowed to make any new findings, either of law or fact, after he has decided the cause and delivered his report. He can then only settle a case which will contain the proceedings had upon the trial, with the request to find upon matters of law and fact, with the exceptions taken to his decision after the report is made and delivered. The referee cannot be required to retry or reconsider the case, with the view to make or to insert in the case new findings upon the law or the facts not embraced in his report. If his finding upon the facts will not sustain his conclusions of law, his judgment, based thereupon, with or without a case, upon the report itself, must be reversed. (*Buckingham agt. Payne*, 36 Barb. 87.) His jurisdictional functions are ended with the delivery of his report. After that he performs a mere ministerial duty in settling a case; that is, stating in due form what did transpire on the trial of the cause, and what he did in fact decide. If there be any particular formal or clerical mistakes, errors or omissions in making his report, or in settling the case, the court can

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doubtless allow these to be amended, but cannot require or authorize any new findings to sustain or reverse the judgment. In this view the decision of the special term was correct, and the order made must be affirmed.

Order affirmed.

NEW YORK SUPERIOR COURT.

JANE HENRY agt. JAMES HENRY.

In an action for a limited divorce on the ground of cruelty, the defendant cannot set up as a defence or counter-claim the adultery of the plaintiff.

New York Special Term, April, 1864.

Before ROBERTSON, Ch. J.

THIS is an action for a limited divorce on the ground of cruelty.

The defendant, after having answered, alleging the like conduct on the part of the plaintiff, now moves for leave to serve a supplemental answer, setting up adultery on her part, and asking an absolute divorce by way of counter-claim.

On the annexed affidavits and the papers and pleadings herein, please to take notice that on the 29th day of March, 1864, at 10 o'clock, A. M. of that day, or as soon thereafter as counsel can be heard, I shall move this court at a special term thereof at chambers at the city hall, in the city of New York, that the defendant be allowed to file a supplemental answer in the above entitled action, and for such further or other order or relief as to the court shall seem meet and just in the premises. Dated New York, March, 21st, 1864. Yours, &c.,

C. S. SPENCER, *Def's. Att'y.*, 339 Broadway.

To JOHN N. LEWIS, *Piffs. Att'y.*, 41 Park Row.

Henry agt. Henry.

City and county of New York, ss: James Henry being duly sworn, says that he is the defendant in the above entitled action; that said action is brought for a limited divorce on the ground of cruel and inhuman treatment. Deponent says that he has served and filed his affidavit of merits herein, and answered the complaint in said action, in which he alleges cruelty on the part of the plaintiff as a ground of affirmative relief, and demands a limited divorce against the plaintiff, and that said action is now at issue.

And deponent says that a motion was made by the plaintiff's attorney for counsel fee and alimony herein, before His Honor JOHN H. MCCUNN, who awarded to the plaintiff two dollars per week as allowance, and fifty dollars as counsel fee, and that the same has been paid by this deponent.

Deponent further says, that since the service of his answer aforesaid he has discovered facts of which he was ignorant when said answer was filed which will constitute a good and separate defence, and a ground for an absolute divorce against said plaintiff; that he has since discovered that one James Bell committed adultery with the plaintiff on the 16th of February, 1864, and also that Michael Bannon had several connections with the plaintiff, and said plaintiff did commit adultery with said Bannon on the 31st of January, 1864, and on the 6th of February, 1864, and this deponent desires to amend his said answer and to set forth said adultery, and demand as affirmative relief an absolute divorce in said action.

JAMES HENRY.

Sworn March 11th, 1864, }
before me, }

DUDLEY R. P. WILCOX, *Notary Public, N. Y. Co.*

City and county of New York, ss: Jane Bell of No. 306 West 19th street, in the city of New York, being duly sworn, says that she is acquainted with Jane Henry and James Henry, the parties to the above entitled action.

Henry agt. Henry.

Deponent says that on or about the 7th day of February, 1864, about two o'clock in the afternoon of that day, deponent saw the above named plaintiff, Jane Henry, in bed with a man named James Bell, at No. 306 West 19th street in said city, and further deponent sayeth not.

her
JANE \bowtie BELL.
mark.

Sworn to before me, this 29th }
day of February, 1864, }

DUDLEY R. P. WILCOX, *Notary Public, N. Y. Co.*

City and county of New York, ss: James Bell of No. 306 West 19th street, in the city of New York, being duly sworn, says that he knows both of the parties to the above action; that on the 16th of February, 1864, at about seven o'clock in the evening, the above named plaintiff came to deponent's house, and remained all night at deponent's house, and slept in the same bed with deponent.

Deponent further says, that during said night he had connection with said plaintiff several times.

his
JAMES \bowtie BELL.
mark.

Sworn February 17th, }
before me, }

DUDLEY R. P. WILCOX, *Notary Public, N. Y. Co.*

C. S. SPENCER, *for defendant.*

J. N. LEWIS, *for plaintiff.*

I. In this action a plea of adultery after the acts of cruelty complained of is not admissible, either as a defence or counter-claim.

1. It cannot be a counter-claim, because it is not part of the transaction alleged in the complaint, nor connected with the subject of the action, to wit, the cruel treatment alleged. (*Code*, § 150; *see Diddell agt. Diddell*, 3 *Abb. Pr.* 167.)

2. It is not a defence, because it is neither a denial nor

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a justification; not even a mitigation of the charge in the complaint. It requires amazing audacity for any man to attempt to justify or even palliate his cruelty to his wife in 1863, by showing that she committed adultery in 1864.

3. It has been well settled that cruelty is not pleadable, either as a defence or counter-claim in an action for divorce on the ground of adultery. (*Griffin* agt. *Griffin*, 23 *How. Pr.* 183; *Diddell* agt. *Diddell*, 3 *Abb. Pr.* 167.)

4. So it has long been settled that cruelty and adultery could not be joined in one complaint as grounds of divorce. (*McIntosh* agt. *McIntosh*, 12 *How. Pr.* 289; *Rose* agt. *Rose*, 11 *Paige*, 166; *Smith* agt. *Smith*, 4 *id.* 92; *Johnson* agt. *Johnson*, 6 *Johns. ch.* 163.)

5. The reasons upon which these decisions were founded, viz: the entire incompatibility of the judgments in the respective cases, the incongruity of the actions, and the total want of connection or similarity between the causes of action, are just as applicable to this proceeding as to the exact cases before the courts which rendered those decisions. (*See to this effect McNamara* agt. *McNamara*, 9 *Abb. Pr.* 18.)

6. There is but one precedent for such a motion as this, and that was denied on the ground that the remedy was by a cross suit only. (*Burdell* agt. *Burdell*, 2 *Barb.* 473; 3 *How. Pr.* 216.)

II. The defendant's affidavit does not state facts sufficient to entitle him to any relief, even if he should prove all that he avers. He nowhere avers that plaintiff's adultery was without his connivance, consent, privity or procurement; to all of which he must swear before the court could grant him a divorce (*Rule* 86). The court never allows a supplemental pleading to be filed, unless it is shown that the pleader would be able to avail himself finally of the facts which he desires to plead, and to recover judgment thereon.

If it be said that the defendant may swear to such facts

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before judgment, the answer is, that he might in like manner omit to allege any other material fact on his application, and excuse himself by saying that it was his intention to supply the omission when he came to plead. The court requires him to state his case fully upon this motion, and will not speculate upon what he may or may not choose to allege after he has obtained leave to plead. It decides upon the facts actually presented; and as there can be no doubt that the facts stated in the defendant's affidavit would entitle him to no relief, his motion must be denied. (*See Monell agt. Monell*, 3 Barb. 236; *Burdell agt. Burdell*, 2 id. 473; 3 How. Pr. 216.)

III. The motion should be denied with costs.

ROBERTSON, Ch. J. The charge of adultery sought to be set up in the answer may be a good subject for a separate action. It is not a counter claim, because it does not arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (*Code*, § 150; *Diddell agt. Diddell*, 3 Abb. Pr. R. 167.) Nor is it a defence, because not connected with the acts of cruelty charged in the complaint. The kinds of relief asked for are entirely different, so that they cannot be joined in one action, (*Johnson agt. Johnson*, 6 J. R. 163; *McIntosh agt. McIntosh*, 12 How. Pr. 289.) and the entire incongruity of the causes of action would prevent their being tried in one action. (*McNamara agt. McNamara*, 9 Abb. Pr. 18.) And it has been so held in one case. (*Burdell agt. Burdell*, 2 Barb. 473. S. C. 3 How. Pr. 216.) It is not necessary to notice other objections.

Motion denied, with seven dollars costs.

Potter agt. Whittaker.

SUPREME COURT.

POTTER agt. WHITTAKER.

Where it appears in the return of a justice of the peace that he issued a *summons*, giving the names of the plaintiff and defendant therein, and also the time and place of its return, the court will presume that the summons was in the *proper form*; and an objection that it does not appear that it was directed to any constable of the county of, (the proper county) is not tenable. If there is any informality in the process, it lays with the party objecting to make it appear.

An objection that it does not appear that the person serving the summons was a constable of the county of, (proper county) cannot prevail; where it appears from the justice's return that he issued a summons, directed to any constable of the county of, (the proper county) which was returned with a return thereon indorsed, that the same was personally served by W. Carpenter, constable. Such a return is to the effect that the summons was served by a constable of the proper county, and also that it was served *within* the county.

Where a justice's return shows, by fair intendment, that all the jurisdictional steps were taken necessary to a valid judgment before him, that he issued a summons, which was served by a constable personally on the defendant, enough is stated to raise the presumption of regularity as to the form of the summons and its due service on the defendant. If any error occurred, it is the duty of the party alleging it to make it appear to the court on appeal, as no presumption of error will be indulged against the regularity of the judgment.

Where the plaintiff, by his own oath, proved that he worked for the defendant 21 days as a carpenter and joiner, for which he had not been paid, and that his services were worth \$2 per day: *Held*, that it was fair to assume that the plaintiff was a carpenter and joiner, and that he worked at defendant's request as such; from which it must be inferred that he was of that trade and calling, and so must be presumed to have been competent to give his opinion of the value of his own services in such trade.

Fourth District, General Term, Warren Co., July, 1863.

APPEAL from a judgment of the Washington county court, affirming a judgment of a justice of the peace obtained by default. The facts will sufficiently appear in the opinion of the court.

TIMOTHY CRONIN, for the appellant, cited, *Allen* agt.

Stone, 9 Barb. 62; *Lamoure* agt. *Caryl*, 4 Denio

370; *Berass* agt. *Copely*, 6 Selden 93.

CHARLES R. INGALLS, for the respondent.

Potter agt. Whittaker.

By the court, BOCKES, J. The recovery was had in this action for work, labor and services rendered by the plaintiff for the defendant. The defendant did not appear on the return of the summons, at which time the trial was had, and judgment was rendered on the evidence of the plaintiff only; who testified that he was the plaintiff in the action and resided in Easton, where the defendant also resided; that the defendant was indebted to him for work, labor and services done for the defendant at his request as a carpenter and joiner. The remainder of his testimony is given as follows: "The work was done in 1859; I worked for him twenty-one days; my services were worth \$2 per day; the defendant has not paid me anything for my work, and is now indebted to me for that work."

The first point taken is that it does not appear that the summons was issued to any constable of the county of Washington. The return states that the justice, on the 5th day of December, 1859, issued a summons in an action in which Harvey L. Potter was plaintiff, and Clark Whittaker was defendant, returnable before him at his office in the town of Greenwich, in the county of Washington, on the 12th day of December, then inst., at 9 A.M.; that it was returned personally served on the defendant, on the 6th day of December, 1859, by W. Carpenter, constable.

It must be presumed, nothing appearing to the contrary, that the summons was in the form prescribed by law. The justice returns that he issued a summons, giving the names of the plaintiff and the defendant therein, and also the time and place of its return. If there was any informality in the process, it lay with the defendant to make it appear.

The initiatory step for the commencement of the action was taken, and irregularity or informality will not be presumed. On the contrary, when it appears that the jurisdictional steps were taken, and nothing appearing to the contrary, it will be presumed that the proceedings were regular and formal.

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There is nothing in the case showing irregularity or error in the summons.

The next objection is, that it does not appear that the person serving the summons was a constable in that county.

Assuming that the summons was in the form prescribed by law, and we have it returned that such summons was personally served on the defendant on the 6th day of December, 1859, by W. Carpenter, constable, as evidenced by his return duly indorsed thereon; that is, the justice returns that he issued a summons, directed to any constable of the county of Washington, which was returned with a return thereon indorsed, that the same was personally served by W. Carpenter, constable. This is clearly to the effect that the summons was served by a constable of that county. It was directed to a constable of that county, and was indorsed with a return which the justice was bound to recognize without further proof. The constable was a public officer, acting under oath, and the return itself afforded presumptive evidence of the fact that the person certifying the service was a constable of the county.

The next objection is, that it does not appear that the summons was served within the county.

It has been held that an indorsement on a summons in the following form: *personally served May 22, 1822, Thomas McKnight, constable*, was a sufficient return. (2 Cow. 418, 1 Sand. 92.) This decision seems to determine the several objections that it does not appear that the person serving the summons was a constable of the county, or that he served the summons within the county.

It is also objected that it does not appear that the defendant was a resident of the county. If it be held necessary to show that the defendant resided in the county of Washington, then such fact appears from the proof. It is proved that the parties, plaintiff and defendant, resided in Easton. The court will take judicial notice of the civil divisions of the county, where established by general law.

Potter agt. Whittaker.

The language of the return must have a fair intendment. It shows that all the jurisdictional steps were taken necessary to a valid judgment before the justice. He issued a summons, which was served by a constable personally on the defendant. Enough is stated to raise the presumption of regularity as to the form of the summons and its due service on the defendant. If any error occurred, it was the duty of the defendant to make it appear to the court on appeal, as no presumption of error will be indulged against the regularity of the judgment.

It is urged that the evidence is insufficient to uphold the judgment. It is clearly proved that the plaintiff worked for the defendant twenty-one days as a carpenter and joiner, for which he had not been paid. The evidence is as follows: "The defendant is indebted to me for work, labor and services done for him at his request as a carpenter and joiner; the work was done in 1859; I worked for him 21 days; my services were worth \$2 per day; the defendant has not paid me anything for my work, and is now indebted to me for that work."

This evidence is meaningless, unless it shows that the plaintiff worked for the defendant as a carpenter and joiner twenty-one days in 1859, for which he had not been paid, and that his services were worth (in his opinion,) \$2 per day.

The only possible question which can be raised is whether the statement, "my services were worth \$2 per day," was inadmissible.

It is fair to assume, from the proof, that the plaintiff (the witness) was a carpenter and joiner. He worked at defendant's request as a carpenter and joiner, from which it must be inferred he was of that trade and calling. So he must be presumed to have been competent to give his opinion of the value of his own services in his own trade. And for aught that appears he was entirely credible.

The judgment must be affirmed.

The People *ex rel.* Greeley agt. The Court of Oyer and Terminer.

SUPREME COURT.

THE PEOPLE *ex rel.* HORACE GREELEY, agt. THE COURT OF OYER AND TERMINER, of the city and county of New York.

The 12th section of the Revised Statutes (2 R. S. 278,) provides that "contempts committed in the immediate view and presence of the court may be punished summarily; in other cases the party charged shall be notified of the accusation, and have a reasonable time to make his defence."

In case of contempt arising under the last clause of this section, the jurisdiction of the court to make the order to show cause, does not depend upon the presentation of *affidavits* or *other evidence* to substantiate the charge. The court may act upon its own motion, and make the accusation, causing the party accused to be notified, and giving him a reasonable time to make his defence. The order contains the charge. And it seems, that the party charged may appear by his counsel and make his defence.

The writ of *prohibition* issues out of this court to restrain subordinate courts and inferior judicial tribunals from exceeding their *jurisdiction*. Where a court of oyer and terminer has jurisdiction touching contempts, this court has no right to interfere touching the practice of that court, by writ of prohibition or otherwise.

New York Special Term, April 1864.

APPLICATION on behalf of the *relator* for a writ of prohibition against the court of oyer and terminer of the city and county of New York.

ISAIAH T. WILLIAMS and WILLIAM FULLERTON, *for relator.*

MARVIN, J. It is represented in the proposed writ that the said court of oyer and terminer, on the 15th day of April, 1864, made an order requiring the relator, described as editor and proprietor of the daily New York *Tribune*, to show cause before the court, on Wednesday morning, the 20th day of said month, why the said relator should not be proceeded against for a contempt, in the publication of a false and grossly inaccurate report of the proceedings in said court in the issue of, &c. It is further represented

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that it did not appear by the order that the same was founded upon any affidavit or affidavits, or upon any sworn testimony whatever; that the relator was, on the said 14th day of April, the editor or proprietor of the said *Tribune*, or that he wrote or published, or knew, or was cognizant of the writing or publishing of the said report of the proceedings of the said court; and that no affidavit or sworn testimony thereof was served upon the relator, together with the order to show cause, or any time before or since.

It is also represented the said court of oyer and terminer, on the said 20th day of April, were moved for and on behalf of the relator, that the order to show cause should be then and there vacated and discharged, on the ground that the court had acquired no jurisdiction of the person of the relator, by reason that it did not appear on the face of the order to show cause that the same was founded upon affidavit or sworn testimony; and that the order to show cause was, for such reason, irregular and void; and that the court of oyer and terminer did decline and refuse to hear the said motion, on the ground that the relator was not present in court, and that the motion was premature, and did then and there deny the motion for the causes aforesaid; and did, thereupon, make a further order, and by and in it wrongfully and in error allege and recite that the relator had then and there appeared by his counsel upon the order to show cause, and did then make an order requiring the relator, so being accused of said criminal contempt, to answer certain interrogatories in the order set forth, and that the relator have until Monday, the 25th day of April, instant, to file answers thereto, and be then heard in the court in defence of the accusation that he published, &c. The representations in the writ proceed to show the grievances of the relator, the substance being as has above appeared, to wit, that the order to show cause was made without any accusation by affidavit or sworn testimony, and that the order to answer interroga-

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tories contained in it recited wrongly and in error the appearance of the relator by counsel; and that the court was about to proceed in the matter of the accusation and require answers to be made to charges and accusations made by the court, of an offence indictable as for a misdemeanor.

The prayer for the writ is in the usual form to prohibit any action in the premises by the court, until, &c., and it is made returnable at the next general term of this court, &c.

The affidavit of John D. Shaw was presented upon the motion containing a copy of the order to show cause as served upon the relator, and an account of the proceeding in the court on the return day of said order. It does not appear in the order by way of recital or otherwise, that it was founded upon affidavit or other written testimony.

It appears, from this affidavit, that Mr. Williams moved the court that the order be discharged and vacated, on the ground that no jurisdiction had been obtained of the person of the relator, "by reason of the absence of such sworn testimony as aforesaid." The affiant had previously stated, that he was informed and believed, that no affidavit or the copy of any, or other sworn testimony, was served upon the relator, together with the order to show cause, or at any time before or since the service of the order. Thus it is true that the *gravamen* of the complaint is, that the order to show cause furnished no evidence that it was founded upon affidavit or sworn testimony.

I do not understand it to be represented that, in truth, no evidence by affidavit or otherwise had been furnished to the court, upon which it proceeded in making the order, unless it is to be so inferred from the form of the motion to vacate the order, as stated by Shaw. That is the language used by the counsel in making the motion.

In the proposed writ, it is represented that the court was moved for and on behalf of the relator, that the order to show cause be vacated and discharged, on the ground

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that the court had acquired no jurisdiction of the person of the relator, "by reason that it did not appear on the face of your said order to show cause that the same was founded upon any such affidavit or affidavits, or upon any such sworn testimony, as aforesaid;" and that, for such reason, it was irregular and void. It is the matter as represented and shown in the writ to which answer is to be made, and such matter must be sufficient to justify the granting of the writ. The point then is, that it did not appear in the order to show cause, that it was founded upon affidavit or other sworn testimony, and no copy of such affidavit, &c., was served upon the relator. This court is not informed, by the relation given in the writ, that the order was made in the absence of any affidavit or sworn testimony. If such evidence was necessary to give the court jurisdiction, and it was actually furnished, the order, I apprehend, would be valid, though it did not recite that such evidence had been presented to the court. The usual practice, undoubtedly is, to refer, by way of recital, to the evidence upon which orders of court are founded. But the jurisdiction of the court cannot be made to depend upon the recital of such evidence or the omission to refer to it in the order.

But is it clear, assuming that the order was made in the absence of any affidavit or other written or sworn testimony, that the court had no jurisdiction? The proceeding is under the statute containing "provisions concerning courts of record, their process and proceedings," (2 R. S. 278.)

By the 10th section courts of record have power to punish, as for criminal contempt, persons guilty of certain acts specified, some of which are acts committed during the sitting of the court, in its immediate view and presence, tending to interrupt its proceedings, or to impair the respect due to its authority.

The 6th subdivision of this section embraces the case of

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"the publication of a false or grossly inaccurate report of its proceedings." The 12th section is "contempts committed in the immediate view and presence of the court may be punished summarily; in other cases, the party charged shall be notified of the accusation, and have a reasonable time to make his defence." The alleged contempt in question comes under the last clause of this section.

The party *charged* shall be *notified* of the *accusation* and have a reasonable time to make his defence.

The statute does not require that the charge should be made upon affidavit or other sworn testimony. The charge may undoubtedly be made by the court, as it is alleged that it was in this case, and the charge is clearly specified in the order to show cause and a time appointed for showing cause, and the relator was duly notified of the accusation and an opportunity given to him to make his defence. And it appears by *The People* agt. *Van Wyck*, (2 *Caines' R.* 333), that the party charged may appear by his counsel and make defence.

It is an error to suppose that in a case like the present, the jurisdiction of the court to make the order to show cause depends upon the presentation of affidavits or other evidence to substantiate the charge. The order contains the charge, and I apprehend that, in practice, such evidence will rarely be furnished, as it is not made the duty of any officer connected with the administration of justice, or any other person, to make charges or accusations of facts constituting criminal contempts. It is a duty imposed upon all courts to preserve order in court, and see to it that its proceedings are not interrupted, or that the respect and authority due to the court are not impaired. And the statute to enable the court to discharge this duty confers the necessary power upon the court. The court may act upon its own motion and make the accusation, causing the party accused to be notified, and giving him a reasonable time to make his defence. The case is not like numer-

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ous cases arising under statutes requiring certain facts to be proved by affidavit before the court is authorized to issue certain process specified. In these cases the jurisdiction depends upon the preliminary proofs shown in the manner specified by the statute.

I do not regard it as necessary in this case to enter upon a discussion of the province of the writ of prohibition, though I have examined the law and the cases cited. It is enough to say that this writ issues out of this court to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction. In the case of *Appo agt. The People* (10 N. Y. R. 540), the court of oyer and terminer was about to grant a new trial in a case of conviction for felony in that court; and this court prohibited that court from granting a new trial, upon the ground that it had no jurisdiction upon that subject. The law is well settled in numerous cases. In this case the court of oyer and terminer has jurisdiction touching contempts, and this court has no right to interfere touching the practice of that court. Complaints are made in the proposed writ touching the interrogatories and the future proposed proceedings. With these questions this court, upon this motion, has no concern. If the proceedings of the oyer and terminer hereafter shall be improper, which is not to be supposed, the law provides the aggrieved party with ample remedies.

In my opinion, the relator has not presented such a case to this court as justifies it in interfering by a writ of prohibition, and the motion must be denied.

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McKenzie agt. Smith.

SUPREME COURT.

JOHN MCKENZIE, appellant, agt. HIRAM SMITH, Sheriff of
Monroe county, respondent.

Where in an action for the *delivery of personal property*, the defendant has been *arrested* under an order pursuant to subdivision 3 of section 179 of the Code, and has given the undertaking with sureties, provided by section 211, "for the delivery of the property to plaintiff, &c.," and been thereon liberated from arrest, and the process returned, but his sureties on being duly execepted to, fail to justify: *Held*, that in such case, the sheriff himself, by such omission becomes bail.

Held also, that the liability of the sheriff as such bail, is of the same nature and extent as that of the original bail, vis: "for the delivery of the property to plaintiff, and the payment of a sum, &c.," (§ 211,) and not "that he shall at all times render himself amenable to the process of the court, &c." And after judgment for the plaintiff in the original action, and execution duly issued and returned unsatisfied, an action may be maintained against the sheriff to collect the said judgment. And where in such case, the sureties neglecting to justify, on exception, did within the time for justifying, deliver up their principal to the sheriff, who again took him into custody, and liberated him on his executing a bond for the jail limits, certifying on the original undertaking that he had been surrendered by his bail: *Held*, that such surrender is not valid, and cannot exonerate from liability the bail or the sheriff, who had become bail in their stead.

The only mode in which the sheriff could exonerate himself, would be by putting in and justifying bail *adapted to the action*, vis: of the kind provided by § 211.

Monroe General Term, December, 1863.

Present, T. A. JOHNSON, J. C. SMITH, and HENRY WELLES,
Justices.

THIS was an action against the sheriff of Monroe county, to enforce his liability as bail in an action for the delivery of personal property, where the defendant in that action had been arrested by order of a judge, under subdivision 3, of section 179, of the Code, for unjustly detaining, secreting or disposing of the property, so that it could not be found or taken by the sheriff, and had given the undertaking with sureties, provided by section 211 of the Code, "for the delivery of the property to the plaintiff, if delivery be adjudged, and for the payment to him of such sums as may be for any cause adjudged against him;" and where

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the sheriff had thereon liberated the defendant from arrest, and had returned the order of arrest, with his return and certificate of the execution and service thereof, and of his having taken such undertaking, together with a certified copy of the undertaking to the plaintiff's attorney. The plaintiff thereupon, in due time, excepted to the sufficiency of the sureties in the undertaking. The sureties neglected to justify on exception, but after the sheriff had returned the order of arrest and the certified copy of undertaking of bail to the plaintiff's attorney, and within the time to justify, they bring in and deliver to the sheriff, the defendant, whereon the sheriff again takes into custody and liberates the defendant upon jail limits, and certifies on the original undertaking, that he has been surrendered by his bail.

The plaintiff prosecutes his action to judgment, enters judgment in due form, for the delivery to him of the personal property, and for payment of costs adjudged, and also for the value of the personal property, if it be not delivered up; issues his execution to the sheriff of said county, where defendant resided, directing the delivery to him of said personal property, and the collection of said costs, and in default of said delivery, also to collect the value thereof, which execution is returned by said sheriff, that defendant had no real or personal property in his county, whereof to make the amount of said execution, or any part thereof, and that defendant refused to deliver the property therein named to said sheriff, and that he, said sheriff could not find the same.

This action was tried at the circuit of April, 1863, before Hon. J. C. SMITH, Judge, jury being waived, and was decided by him for the defendant, from which judgment plaintiff appealed.

T. FROTHINGHAM and J. C. COCHRANE, *for appellant.*
WM. F. COGSWELL, *for respondent.*

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WELLES, J. Section 201 of the Code declares that if, after being arrested, the defendant escape or be rescued, or bail be not given, or justified, or a deposit be not made instead thereof, the sheriff himself shall be liable as bail. But he may discharge himself from such liability by the giving and justification of bail, as provided in sections 193, 194, 195 and 196, at any time before process against the person of the defendant, to enforce an order or judgment in the action. Section 187, provides and declares the nature and the kind of bail which the defendant is to give, in order to be discharged from the arrest. It is to be a written undertaking, to be executed by two or more sufficient bail, to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he be arrested for the cause mentioned in the third subdivision of section 179, an undertaking to the same effect as that provided by section 211.

The bail required in section 211, is an undertaking, by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant.

The question in the present case, assuming that the defendant became bail at all, is, what was the nature of that bail, and what liability or obligation he thereby incurred; whether that specified in section 187, or that mentioned in section 211.

I incline to think it was the latter.

The action in which the arrest was made, was brought to recover the possession of personal property, and the only bail which the sheriff could take was that provided in section 211. Such bail being taken, they could not dis-

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charge themselves from their liability as such by surrendering the defendant. (§ 188, *subd. 2, last clause.*)

Their liability became fixed, upon the plaintiff's establishing his right to the property by the judgment of the court.

If the sheriff himself became liable as bail, it seems to me it must have been the same kind and character of bail, and with the same liabilities as the plaintiff was entitled to demand in case other persons had become bail by a written undertaking. In other words, bail adapted to the action.

It remains to consider whether the sheriff, the defendant in the present case, did, in fact, become bail for the defendant in the case in which the arrest was made by him, by force of section 201 of the Code, and whether if so, his liability as such bail continues.

The condition of the sheriff becoming bail after the arrest, where the defendant has neglected to make the deposit, under section 197, is one of the following things: The defendant's escape or rescue, his neglect to give bail, or having given bail, their neglect to justify, after the plaintiff had given notice in proper time that he did not accept the bail.

It does not appear that Bills, the defendant in the first action, made the deposit. It does appear by the case, that upon Bills being arrested, he gave bail by two persons executing in proper form, an undertaking, to the effect prescribed by section 211; that the present defendant thereupon liberated and discharged the said Bills from such arrest, and accepted the undertaking last mentioned, and delivered to the attorney for the plaintiff in that action, a copy of such undertaking, with his certificate indorsed thereon, that it was a true copy, together with the original order of arrest, with his certificate indorsed thereon, that he had arrested the said Bills, and taken bail as therein commanded and directed. That the plaintiff's attorney,

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within ten days thereafter, served upon the present defendant, as such sheriff, a notice that he did not accept the bail given by the defendant Bills, on the arrest in that action and at the same time caused a similar notice to be served on the attorneys for said Bills in said action. No steps were taken with a view of justifying such bail after the notice last mentioned was served.

The omission to justify the bail is made by section 201, among other things, sufficient to create the sheriff's liability as bail. My conclusion therefore is, that he did by that omission become liable as bail.

Has he done anything to legally discharge himself from such liability? In other words, has he given and justified bail as provided in sections 193, 194, 195 and 196? Nothing of the kind is shown by the case. A compliance with those sections, is the only means by which the defendant could discharge himself from such liability.

They provide in detail for justifying the bail given, or giving new bail, and justifying the same. In either case, by section 187, the bail must be to the same effect as that provided by section 211, where the order of arrest was for the cause mentioned in the third subdivision of section 179.

The surrender of Bills to the defendant, as stated in the case, was unauthorized and void, and did not discharge or affect their liability, upon their undertaking. (§ 188, *subd. 2, last clause.*) The surrender was probably intended as a substitute for justifying the bail under the sections before referred to; but if the foregoing views are correct, it was done under a mistaken view of the law.

It would therefore seem that by a logical view of the case, and the sections of the Code referred to, the defendant in the present case is liable to deliver the property to the plaintiff or pay its assessed value, and to pay the costs of the action against Bills.

If that be so, the learned justice before whom the action

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was tried, has fallen into an error in rendering judgment in favor of the defendant.

It was contended on the argument that the sheriff had done all that he could do, and to hold him liable under the circumstances of the case, would be unreasonable and severe, and is not required by the spirit of the Code.

It so struck me at the first, and I have struggled to maintain my first impressions, but find myself unable to resist the conclusion to which I have arrived.

Upon reflection, the hardship upon the sheriff is not so great as it first appeared. By section 185 the sheriff is to arrest the defendant, and keep him in custody until discharged by law. Section 186 provides that the defendant at any time before execution shall be discharged from arrest, either upon giving bail or making a deposit &c. Section 187 provides how bail may be given. It is to be by causing a written undertaking to be executed by two or more *sufficient* bail, &c. The bail are to be sufficient. It does not say: to the satisfaction of the sheriff. He is no where made the judge of the sufficiency of the bail. It is to be bail apparently sufficient. If they make an *ex parte* affidavit showing their sufficiency, the sheriff would probably be justified in taking them. However this may be, the plaintiff has the right in all cases to decline accepting the bail, and in that case they must justify as provided in sections 193 to 196 inclusive.

The sheriff has the right, I think, to detain the defendant in his custody until the plaintiff shall be deemed to have accepted the bail by omitting to give the notice mentioned in section 192, or if such notice be given, until the bail have completed their justification. If this be so, he can always protect himself.

For the foregoing reasons I think the judgment should be reversed, and a new trial granted.

JOHNSON, Justice, concurred.

J. C. SMITH, Justice, dissented.

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SUPREME COURT.

ANDREW LAWRENCE agt. WEARE, D. PARSONS, collector of the goods and chattels of ABRAHAM R. LAWRENCE, deceased.

Where a *surrogate* has jurisdiction to prove a will, he is vested with all the powers incidental and usual for the exercise of such jurisdiction; and it is competent for him to permit any person claiming an interest in the estate affected by the will, to intervene and contest its due execution, or show that it should not be admitted to probate. And this court will not, in a proceeding by a new action, arrest him in the exercise of the powers vested in him, or control him in the manner in which they shall be exercised.

Where duly admitted contestants of a will, claiming as heirs-at-law of the testator, file objections to its validity on their behalf, by which it is insisted that it has not been executed according to law; or if it has, then that it has been revoked, and an issue, by a denial of these allegations, has been raised, the determination of which, with the question as to the fact whether those contestants are heirs-at-law of the testator, is likely, in the judgment of the surrogate, to occupy considerable time, it presents a case where the surrogate clearly has the power, in his discretion, to *issue special letters of administration*, authorising the preservation and collection of the goods of the deceased.

This court cannot, except on a review upon appeal, inquire into or call in question the validity of the surrogate's appointment of an administrator or collector, on the ground that he has failed to comply with the directory provisions of the law prescribing his duty, as among others, in reference to the sufficiency of the sureties, and the amount in which the security should be given, in cases where he has become possessed of the jurisdiction to make such appointment. On the contrary, the omission to comply with those requirements would not render the proceedings void.

Brooklyn Special Term, April, 1864.

THIS was a motion for an injunction to restrain the defendant, Parsons, from acting as collector of the estate, under the appointment made by the surrogate of the county of New York. The allegations of the plaintiff are sufficiently set forth in the opinion. A similar motion had theretofore been made in the court of common pleas of the city and county of New York, and denied by Judge Cardozo.

WILLIAM FULLERTON AND LAWRENCE & HALL, *for the plaintiff.*

JOHN C. VAN LOON, *for the collector.*

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Lott, J. It is conceded that the surrogate of New York had jurisdiction to prove the will in question. He was, therefore, vested with all the powers incidental and usual for the exercise of such jurisdiction, and it was competent for him to permit any person claiming an interest in the estate affected by the will to intervene and contest its due execution, or show that it should not be admitted to probate. And this court will not, in a proceeding by a new action, arrest him in the exercise of the powers vested in him, or control him in the manner in which they shall be exercised. The order made by him, admitting Abraham R. L. Norton and Cecelia A. Norton to appear as contestants, under the claim that they were heirs-at-law of Abraham R. Lawrence, the testator, was one, therefore, within his jurisdiction, and I must assume that they have obtained a *status* authorizing them to be represented in the proceedings instituted for the proof of the will. Objections to its validity have on their behalf been filed, by which it is insisted that it has not been executed according to law; or, if it has, then that it has been revoked.

These allegations have been denied. An issue has thus been raised, the determination of which, with the question as to the fact whether those contestants are heirs-at-law of the testator, was likely, in the judgment of the surrogate to occupy considerable time. This presented a case where he clearly had the power, in his discretion, to issue special letters of administration, authorizing the preservation and collection of the goods of the deceased, (2 *Rev. St.*, p. 76, § 38, as amended by chap. 460, § 23 of the laws of 1837.)

The statute provides what shall be required and done on issuing such letters and preliminary thereto. One of these requirements is that a bond shall be executed by the person to whom they are to be issued, with sureties, to be approved by the surrogate, in the penalty of not less than twice the value of the personal estate of which the deceased died possessed, which value shall be ascertained by the

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surrogate, by the examination, on oath, of the party applying, and of every other person he may think proper to examine. In the case before us such special letters were issued to the defendant on his executing a bond in the penalty of one hundred and seventy thousand dollars, the sum or amount required by the surrogate, with sureties approved by him.

It is alleged in the complaint that the personal estate of the deceased, at the time of his death, and at the time of the commencement of this action, amounted to more than the sum of \$85,000; and that it does not appear, by the record of the proceedings in said surrogate's office, that the said surrogate did at any time ascertain the value of the personal estate of the deceased, by an examination on oath of the applicant for the letters, or any other person, for the purpose of fixing the penalty in the said bond, "nor was any such examination made, as plaintiff is informed and believes."

In the statement made or account given by the plaintiff of the amount or value of such personal estate, consisting of cash deposited in bank, stocks and bonds, leases, household furniture and library, the aggregate sum is \$84,912.30. This may not include all, because it speaks of these as constituting, with other property, the personal estate, amounting to more than \$85,000. We have, however, no means of ascertaining, from the papers before us, what this "other property" consists of, or what its value is, nor how much it will increase the assets over \$85,000.

It is difficult to believe, from all the facts disclosed, that the surrogate arrived at the valuation of the effects of the deceased so nearly approximating the value stated in the complaint without a proper inquiry. It may be true that no formal examination by questions or interrogatories in detail may have been made, of which a record has been kept, but it may, nevertheless, be true that all the facts in relation to that subject were fully stated in the petition

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asking for the appointment of a special administrator or collector, which, in practice, is the usual mode adopted, and is deemed a sufficient compliance with the requirements of the law. (*See Dayton on Surrogate*, p. 223.) The allegation that the plaintiff was "informed and believes" that no such examination was made unsupported by the oath of the informer, and without disclosing who he is or what his means of knowledge are, is wholly unreliable for judicial action. I do not, however, mean to be understood as conceding that this court, except on a review upon appeal, can inquire into or call in question the validity of the surrogate's appointment of an administrator or collector, on the ground that he has failed to comply with the directory provisions of the law prescribing his duty in cases where he has become possessed of the jurisdiction to make such appointment. On the contrary, I am of the opinion that the omission to comply with those requirements would not render the proceedings void. This remark applies as well to the allegations of the complaint in reference to the sufficiency of the sureties as to the amount in which the security should be given, and is sustained by the decision of this court in *Bloom agt. Burdick* (1 *Hill*, 130), and by that of the court of appeals in *Sheldon agt. Wright* (1 *Selden*, p. 497). In the first of these cases the surrogate had granted letters of administration on taking one surety only in the bond when the statute required two at least. Judge BRONSON remarked in reference to that question, that "the duty of the surrogate is plain, but the omission to take two or more sureties is not a matter which goes to the foundation of the proceedings so as to render the letters of administration void;" and added, that "if the facts essential to the jurisdiction, in granting administration existed, the omission to take a proper bond was an error to be corrected on appeal and not a defect of jurisdiction, which would render the whole proceeding void." This principle is fully recognized and affirmed in the other

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case. The only ground on which the plaintiff has founded any color of claim to an injunction against the defendant's proceeding in the execution of his trust and for the appointment of a receiver is, that he "believes that there is danger of loss and damage to this plaintiff and to the estate of the said Abraham R. Lawrence, in case the said defendant should take possession of and collect the assets and property of the said deceased, without giving further security than he has done for the performance of his duties as such collector." That belief is stated to be founded on information that one of those sureties "is not a man possessed of large means; that he is under heavy responsibilities as maker and indorser of promissory notes, and as obligor in bonds, and, particularly, is surety to large amounts upon other bonds in the said surrogate's office; and that he is not of sufficient pecuniary means or other sufficient property to qualify him as a fit and proper surety for the sum of \$170,000, or any sum at all approaching that amount; and that he does in fact as a surety in the bond so given by the said defendant, furnish but little additional security for the faithful performance, by said defendant, of his duty as such special administrator;" and on the further information "that another of said sureties on the bond given by the said defendant, Parsons, is a surety on some other bond or bonds in said surrogate's office, to the extent, at least, of \$50,000," and "is not a person of large available means."

These allegations are insufficient. The means of knowledge possessed by the persons giving such information are not disclosed, nor is the information verified on oath. The statements are, moreover, too general, being in effect nothing more than a general expression of opinion that those sureties are not competent or sufficient, without any disclosure of the amount of property possessed by them or which they are represented to possess, nor as to the extent of the liabilities named by them in comparison with such

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property. One of those sureties justified before the surrogate to the full extent of the penalty of bond, and the other justified to the amount of \$43,000, and they were both approved by the surrogate, who must be presumed to have been cognizant of the extent of their liabilities, if any, in his office, and there is no allegation that their means have been impaired or that their responsibility has been injudiciously affected since their execution of the bond. It, moreover, appears by the complaint that there were two other sureties in the bond, each of whom justified in the sum of \$43,000, and the defendant avers "that each of the said four sureties is, as he is informed and believes, worth double the amount of said personal estate of deceased." This averment, being on information and belief, is subject to the same remarks as made in reference to the plaintiff's other statement of a like character, and may be considered to be entitled to no more weight. Nor is there any ground for saying that it is entitled to any more consideration. The result of these allegations is, that we have no evidence in fact to impeach the sufficiency of the surety. If it be conceded that there is some doubt cast as to that of Devlin and Huggins, there is no question made as to that of Schell and French—unless it be the simple fact that they each justified in only \$43,000.

That alone is not sufficient to show that they were not worth much more, and in a proceeding where the inadequacy of a security approved by a judicial officer in the discharge of his official duties is alleged as a ground for interfering with the acts of a person appointed by him, it should affirmatively appear that such security is inadequate and should not be left to inference merely. Upon the whole I am not satisfied that a case is made out showing that the fund in question is in danger of being lost or in any way impaired by reason of the inadequacy of the security taken by the surrogate, nor that there is any reason for requiring any more than is already given, nor for

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the interference by this court with the action of the surrogate or of the collector appointed by him, on any of the grounds stated in the complaint. I may add that if there had been a sufficient foundation for an injunction in the facts alleged in the complaint, the necessity of a recourse to such a remedy is virtually removed by the act of the legislature entitled "An act in relation to special administrators or collectors of the goods of deceased persons," passed March 26, 1864, referred to on the argument and submitted by the plaintiff's counsel. The plaintiff's motion must therefore be denied, and the temporary injunction is dissolved with \$10 costs.

SUPREME COURT.

GEORGE E. MEAD agt. JAMES H. MALLORY, &c.

No costs will be taxed for the attendance and travel fees of *foreign witnesses* at previous circuits, where they have all disappeared when the cause was tried. And in allowing the fees of home witnesses who attend at the trial, and who reside but a short distance from the court-house in the same county, any *travel fees* for such witnesses charged as having been subpoenaed and travelled from a far distant county, will be stricken out. If they were temporarily called away from home on business, they should have been subpoenaed in due time.

Otsego Special Term, July, 1863.

MOTION by defendant for retaxation of costs.

HENRY SACIA, *for defendant.*

F. FISH, *for plaintiff.*

CAMPBELL, J. After hearing counsel and carefully examining papers in this action, I am under a strong conviction that great injustice was done the defendant in the taxation of costs. I have repeatedly held that in cases like this, where witnesses appear and disappear at different

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circuits, and where their materiality is not made very distinctly to appear, no allowance should be made. Referring to the case before me, it appears that all the foreign witnesses who appear at the certain circuits, and for whom large amounts for travel fees are allowed, entirely disappear from the scene of action when the cause is finally tried. At one of these circuits the cause went over, it would appear on the payment of costs by the defendants, the amount paid being between sixty and seventy dollars. It is very singular that three of the home witnesses, living very near the court-house, were temporarily absent, and their travel is allowed from Buffalo. It does not appear from what cause they were absent from home. If they were engaged in any business which took them from home, such as boating on the canal, they should have been subpoenaed in due time. At all events, I do not think travel fees should have been allowed them from Buffalo.

If, at the adjourned circuit in November, 1862, there was a new calendar made up and causes noticed regularly for that, then clearly the term fee was properly allowed, for it was in effect a distinct circuit. How this was does not appear, and I think the item was properly taxed.

As I have already in substance remarked, the case wears a suspicious aspect, notwithstanding the affidavit of the plaintiff that everything was done in good faith.

There should be struck from this bill of costs all charges for foreign witnesses at all the circuits prior to the one at which the cause was tried, and also all travel fees for the three witnesses who reside at Fultonville, and who attended at the trial.

I know from the certified copy of the minutes of trial that in fact but one, of all the witnesses sworn to as material, was examined on the trial, and he was a resident of Fultonville. It was not a mere inquest, as it appears that four witnesses were called on the part of the defendant. The plaintiff and his attorney were also called as witnesses

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for the plaintiff. I have hesitated and doubted whether I ought not to strike out the charges for the witnesses not sworn. The order will be as above, allowing all the term fees and charges for witnesses attending on the trial, striking out the travel fees from Buffalo, and striking out all charges for foreign witnesses at the previous circuits, they having all disappeared when the cause was tried. There may be ten dollars costs to the defendant on this motion.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE MAYOR,
&c., OF THE CITY OF NEW YORK, JAMES B. TAYLOR, DOW
D. WILLIAMSON AND JOSEPH B. VARNUM.

The city of New York has full power to purchase or sell real estate; and there are no trusts in this respect imposed upon the city, the violation of which, will affect the interests of the *people of the state at large*.

The *people of the state* have no more right to intervene through their courts and arrest the action of the city in a matter in reference to and over which the authority of the city extends than they have in the case of private corporations or individuals. If the city, as a corporation, is defrauded in the sale of its real estate, it has its remedies. The people of the whole state are not called upon to take action in their courts for the protection of the interest-rights of the municipal corporation, any more than of such rights of other corporations or individuals.

New York Special Term, April, 1864.

Demurrer by the mayor, &c., to the complaint.

JOHN E. BURRILL, *for the plaintiffs.*

WILLIAM F. ALLEN, *for the defendants.*

MARVIN J. I have examined with some care the statutes and ordinances referred to by the counsel for the plaintiffs, and also the authorities cited by him, and in my opinion the people of the state of New York have no such interest in the questions raised by the complaint as enti-

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tles them to come into this court and demand the exercise of its restraining power, or its decree avoiding the sale made by the city to Varnum.

It is an elementary principle that a plaintiff must have an interest in the subject matter of the suit; not that general interest which all mankind have in the fair and honest action of states, municipal corporations and individuals, but an interest which is to be injuriously affected by the wrongful acts (done or threatened) complained of. The power of the city to sell its real estate is not denied, nor its power to purchase real estate. I do not find in the statutes or ordinances any trusts imposed upon this city the violation of which will affect the interests of the state at large. If the city as a corporation was defrauded in the sale to Varnum, it had its remedies. The people of the whole state are not called upon to take action in their courts for the protection of the interest-rights of the municipal corporation of New York any more than of such rights of other corporations or individuals. Nor have the people of the state any more right to intervene and arrest the action of the city in a matter in reference to and over which the authority of the city extends, than they have in the case of private corporations or individuals. I refer, of course, to intervention by a civil action in the courts. The legislature may enact laws changing the powers of municipal corporations, and depriving them of powers previously possessed. But courts act in reference to rights existing at the time their action and judgment are invoked; and if, by the law, the plaintiff has no interest in the matter complained of, he can have no right to complain, though others who have an interest may. As I have said, I do not find in the statutes or ordinances any trusts in favor of the people of the state, and the court of appeals held, upon the facts in this case, that a corporator and taxpayer in the city had no such interest as enabled him to maintain an action (*Roosevelt agt. Draper*, 23 N. Y. R. 324),

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In that case, I think, it was a fair matter of argument whether Roosevelt had not that kind of interest which would give him a standing in court for its protection, but the court held otherwise. In cases referred to in *Duer's Reports*, the city was, as the court held, about to erect a public nuisance, and it was held that the people of the state should be a party. There is no question of nuisance in the present case. So in the case cited (12 *Pet.* 98), the question of the jurisdiction of courts of equity in cases of public nuisances is considered.

In the *Attorney-General agt. Cohoes Co.* (6 *Paige*, 133), the state owned the property, the canal, which was to be injured by the threatened acts of the defendant. The case cited from 4th *Mylne and Craig*, 17, was an information filed by the attorney-general, at the relation of certain ratepayers in the borough of Poole. It was held that the court of chancery had jurisdiction to prevent the town council of a borough from abusing the powers given to them by an act of parliament referred to. The Lord Chancellor examined the statute, and held that it created a trust in the corporation of the borough fund, and said that the information sought to protect such trust fund, and he held that the court had its ordinary jurisdiction over it. The case is not an authority for sustaining this action. But I will not pursue the question further, being satisfied that the state has no right to come into court on account of the grievances complained of.

The statute (2 *R. S.*, 179), making it the duty of the attorney-general to prosecute and defend actions in the courts in which the people of the state shall be interested, does not help the matter. I have applied the very test which the legislature applied, viz: interest. Nor do the provisions in the article "of proceedings against corporations in equity" (2 *R. S.*, 462), embrace the present case. There must be judgment for the defendant demurring, dismissing the complaint with costs.

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NEW YORK SUPERIOR COURT.

SOPHIA ZORKOWSKI agt. SAMUEL ZORKOWSKI.

Dates are always flexible in a pleading; variances in that respect between it and the proof may be disregarded, (*Code*, §§ 169, 170, 173, 176,) and a pleading is hardly *demurrable* now for want of a time and place for every occurrence stated in it. A referee would not be entitled, therefore, to report against a fact, merely because its date was wrongly stated.

But in actions for an *absolute divorce* for adultery, the complaint should allege that the discovery by the plaintiff of the defendant's criminality took place within a certain time before the commencement of the action, because, as it affects the propriety of decreeing a divorce, such time has been fixed by law, and the insertion of such allegation in the complaint is required by an absolute rule.

The discovery of such criminality more than *five years* before bringing suit, is made by the Revised Statutes a defence to the action; but the 163 rule of the late court of chancery required most of the matters constituting a defence under such statutes to be *negatived by the complainant in his or her bill of complaint*, to enable the court, by the reference to a master, to take proof of all the material facts stated therein, and report the testimony taken thereon, to ascertain whether the facts required to be denied existed or not. The 86th general rule of the supreme court, providing merely for the substitution of an affidavit by the complainant for his or her verification of the complaint, was not intended to accomplish the same purpose as the former rule, and does not repeal it.

The testimony in this case considered insufficient to establish the commission of adultery, and the case sent back to the referee to take further testimony.

New York Special Term, March, 1864.

ROBERTSON, CH. J. The complaint in this case does not allude to the lapse of any space of time since a discovery by the plaintiff of the defendant's guilt, although the date fixed therein for such discovery is within the present year. If, therefore, it be necessary for the plaintiff to bring such discovery within a certain period before the commencement of the action by a direct allegation, the complaint is defective. Dates are always flexible in a pleading; variances in that respect between it and the proof may be disregarded, (*Code*, §§ 169, 170, 173, 176,) and a pleading is hardly *demurrable* now for want of a time and place for every occurrence stated in it. A referee would not be en-

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titled, therefore, to report against a fact, merely because its date was wrongly stated.

It is material, however, in actions for an absolute divorce, that the complaint should allege that the discovery by the plaintiff of the defendant's criminality took place within a certain time before the commencement of the suit, because, as it affects the propriety of decreeing a divorce, such time has been fixed by law, and the insertion of such allegation in the complaint is required by an absolute rule. The discovery of such criminality more than five years before bringing suit is made by the Revised Statutes a defence to the action; but the 163d rule of the former court of chancery required most of the matters constituting a defence under such statutes to be negatived by the complainant in his or her bill of complaint; while the last of the present general court rules (93d) makes the previous practice of the supreme court and court of chancery control proceedings in all cases not provided for by statute or general court rules. The present 86th general court rule provides merely for the substitution of an affidavit by the complainant for his or her verification of the complaint. Such affidavit is required to deny the same facts as were required by the former chancery rule to be denied in the complainant's bill, and merely probes the plaintiff's conscience in addition to any testimony taken in the action. That present rule was not intended to accomplish the same purpose as the former one, and does not repeal it. The object of the 163d rule in chancery is stated by chancellor WALWORTH to have been to enable the court, by the reference to a master, to take proof of all the material facts stated in a bill for divorce, and report the testimony taken therein by him and his opinion thereon; to ascertain whether the facts required to be denied existed or not; (*Dodge v. Dodge*, 7 Paige, 500,) and he also stated that in furtherance of such object it became the duty of such master to examine witnesses in reference to the facts so denied, in

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order to furnish the court with materials for their judgment. The same doctrine is reiterated and enforced in *Dobbs* agt. *Dobbs, Jr.*, (3 *Cow.*, 377.) The propriety and necessity of courts continuing to pass upon the same questions renders the taking of testimony by a referee, upon all the facts required to be denied in the complaint as well the offence charged, still essential (*Arborgast* agt. *Arborgast*, 8 *How.*, 297); notwithstanding the Code and present practice seems to dispense with the necessity and propriety of requiring the referee to report his opinion on the testimony, (*Code*, 246, *Subd.* 2, *Gen. Rule* 86) which is only allowed and required in litigated questions of fact where his report assumes the character of a special verdict (*Code*, § 271, *Subd.* 3, § 272.)

The difficulty in this case, in reference to the lapse of time since the plaintiff's discovery of the defendant's guilt, grows out of the omission of a denial in the complaint of the time of such discovery being beyond the statutory limit. The consequence has been the omission of all testimony as to the time of such discovery, although it must have been within such period. The evidence of non-access by the husband to the wife since the discovery by the latter, whenever it occurred, is very feeble, and there is in fact none at all of any such discovery, except by the commencement of the suit. It would seem that the time of such discovery was overlooked as wholly unessential, not only as to the time of bringing the suit, but also in reference to cohabitation since it occurred.

The evidence to repel any suspicion of collusion is also quite defective. The two witnesses, who testify that they accompanied the defendant to what they call a house of prostitution, merely drank with him there, and saw him go up stairs with a female. They swear that he was the person who married the plaintiff, but do not pretend to have been present at the marriage. The clergyman or priest who officiated is also not produced, and his absence

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is omitted to be accounted for, and no marriage certificate is introduced. According to the plaintiff's father's testimony, his daughter and the defendant lived together after their marriage one month at the house of the witness; they then went away to live elsewhere. She returned the next day after such departure, and has ever since lived with her father apart from her husband. In about a month afterwards, the two witnesses who went with the defendant as his companions to the house where alone he is alleged on a single occasion to have violated his marriage vow, are found, and such violation is discovered within the second day after it occurred. One witness alone stated that he knew such house to be one of prostitution; but even he did not state how he obtained such knowledge, except that the upper rooms were bed-rooms, a circumstance too common to respectable dwellings to be very decisive by itself. The partner in the offence was said to be a young woman, by whose side he sat in such house on a sofa, whose hand he took, and round whose waist he placed his arm. The propriety of such liberties, which were the only ones established, may have depended somewhat on the intimacy of the parties; at all events they were not of so lascivious a character as to justify the conclusion that they were necessarily so preparatory to or provocative of the commission of the offence as to give character to the purpose of the subsequent retiring of the parties. So, too, the defendant and such female were seen to go up stairs together, and after being absent from fifteen to thirty minutes return to the room together. Where they went or spent the time of such absence does not appear. There was no evidence, therefore, of such previous intercourse between the parties, or of such conduct on their part as to lead unavoidably to the conclusion that the design of their withdrawal was criminal; nor was there evidence of such parties withdrawing out of observation together and going into and remaining in such a place, or

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under such circumstances of secrecy or otherwise, as to warrant the conclusion that they must have remained together while so out of view for the purpose of illicit intercourse, in consequence of any inability to put a different or innocent interpretation upon their presence there. It seems fair to assume that the witnesses did not see enough to establish the commission of the offence, because they were not pressed to tell it if they did so. The estrangement of the plaintiff from the defendant was evidently not owing to the discovery of such supposed offence, as it had taken place a month previously, and this suit was commenced the next day after such alleged discovery in order to divorce a pair who had lived together after their marriage only one month. There is a mystery in the case which requires solution, and it must go back to the referee to have the testimony, if it exist, necessary to remove all doubts supplied.

The form of the order of reference in this case is very extraordinary, as it gives judgment for the relief demanded before any report made; which, being irregular, must be stricken out, and the case sent back to the same referee to take other testimony.

COURT OF APPEALS.

JOHANNA MURPHY respondent, agt. THE COMMISSIONERS OF
EMIGRATION, appellants.

The commissioners of emigration are not responsible for the carelessness, negligence, misfeasances, or positive wrongs, of their agents or employees.

Argued June Term, 1863. Decided October, 1863.

THIS action was commenced by summons, dated August 31st, 1857, in the New York common pleas. The pleadings are as follows:

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Complaint.—The complaint of the above named plaintiff respectfully shows to this court: that the defendants are a body corporate, created by, and existing under the laws of the state of New York, under the corporate name or style of the Commissioners of Emigration; and as such corporation, are located and do business at the city of New York; and as such corporation, were doing business at said city on the 18th day of August, 1857, and both before and subsequent thereto.

Plaintiff alleges, that a part of the business of the defendants, so carried on as aforesaid, consists in providing for and protecting emigrants, upon their arrival at the port of New York. That the defendants have a place of business at what was formerly known as Castle Garden, in said city, where emigrants are landed by the defendants, and baggage taken and deposited; and that in the prosecution of their said business, the said defendants employ and use divers agents and servants, at their place of business aforesaid.

Plaintiff alleges, that on or about the 18th day of August, 1857, she arrived at the port of New York, in the ship Ontario, and brought with her three boxes or chests, containing various articles of personal property, money, jewelry, &c., &c.

That while the said vessel was lying in the harbor, the defendants received into their possession the said three boxes, on or about the said 18th of August, and undertook to transport and forward the same for plaintiff to the city of New York, and to their said business place, viz. Castle Garden.

Plaintiff alleges that she went with her said baggage upon a steamer used by defendants for the transportation of passengers and baggage to the city of New York, at the time aforesaid, and went away, leaving the said three boxes in the custody of the defendants.

Plaintiff alleges that while her said chests were in the

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custody and possession of the defendants, one of them was lost, together with a large amount of gold coin and personal property, being therein; the same being the property of this plaintiff; and she has never received the same from the defendants, or any one else, though she has demanded the same of the defendants.

She alleges that the chest so delivered to defendants, and so lost as aforesaid, contained, when so delivered, the property following, that is to say :

Two hundred and forty English sovereigns, (being gold coin) of about the value of.....	\$1,161 60
9 silver spoons of the value of.....	9 00
1 gold watch and two chains, of the value of..	72 60
9 yards of flannel, of the value of.....	12 50
1 black silk dress, of the value of.....	14 52
2 pairs of blankets, of the value of.....	6 00
3 quilts, of the value of.....	7 50
2 pairs of boots, of the value of.....	3 75
4 pairs of gloves, of the value of.....	1 50
3 collars, of the value of.....	90
2 pairs of sleeves, of the value of.....	50
	<hr/>
	\$1,290 37

And she alleges that she has stated the value of said articles as above correctly, and that the entire value of the gold coin and other property which she delivered to the defendants—and they lost as aforesaid—is about the sum of twelve hundred and ninety dollars and thirty-seven cents.

Wherefore, she demands judgment against said defendants, for said sum of twelve hundred and ninety dollars and thirty-seven cents, together with damages for the detention thereof, in the sum of one thousand dollars.

Answer.—The above defendants, the Commissioners of Emigration, answer the complaint of Johanna Murphy, the

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above plaintiff, and deny that they are a body corporate, as stated in said complaint.

And the said defendants, further answering say, that they are officers of the state of New York, who may sue and be sued by the title of the Commissioners of Emigration, and as such, their duties and business are defined in and by the statutes of said state; and they deny that their business in whole or in any part, is any other than is thus defined in and by said statutes.

And the said defendants admit that they have a place of business at Castle Garden, mentioned in said complaint; but they deny that emigrants are there landed by these defendants, or any one on their behalf or by their authority, or baggage taken or deposited by or with these defendants, or by or with any one by their authority or on their behalf; and they further deny the employment or use of divers or any agents or servants, as stated in said complaint.

And these defendants further answering, deny that they received into their possession the three boxes, or any of them, mentioned in said complaint; and they further deny that they undertook to transport or forward the said boxes, or any of them, to the city of New York, or to Castle Garden aforesaid, or to any other place.

And they further deny, that at the time mentioned in the said complaint, or at any other time, these defendants had or used any steamer for the transportation of passengers or baggage to the city of New York; and they further deny that the said boxes, or any of them, ever came to, or were at any time left in the custody of these defendants.

And these defendants further answering, deny that the said boxes were ever in the custody of these defendants, and say that they have not knowledge or information sufficient to form a belief as to whether or not one of said boxes or any of its contents was lost; but they admit that the said plaintiff has never received the same from these defendants, these defendants never having had the same

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delivered to them, or to their agents, or in their possession, or under the control of these defendants, or of their agents, or any of them.

And these defendants deny that they ever lost the said boxes or any of them, or the contents of any of them, or the articles, or any of them mentioned in said complaint.

And the said defendants further answering, say, that as to every allegation and statement in the said complaint contained, not hereinbefore answered, admitted, or denied, they have not knowledge or information sufficient to form a belief.

The action was tried before HON. CHARLES P. DALY, First Judge, and a jury, on the 8th November, 1858.

It appeared from the testimony, that the plaintiff in August, 1857, came to this country as a second cabin passenger, in the ship Ontario; that she brought three chests of baggage with her; a tug-boat came alongside the ship, and two men put three strap checks on the three chests, and gave plaintiff the checks; all the passengers were taken to Castle Garden; the plaintiff testified that she saw her baggage go on the tug boat, and did not see it afterwards until she got subsequently two of her chests. The next morning she went to the storekeeper at Castle Garden, and asked him if she could get money out of her chests; he asked her how much she had, and she told him she had two hundred and forty sovereigns; he told her he could not get her baggage if she was not going out of town, until after those who were going away had got their baggage, and to come next morning; on the next day plaintiff and her sister went to Castle Garden; she handed the storekeeper the three checks for her chests, and he took out two of her chests, with an old chest that she would not take—he then gave her back the check; she went again next day, and the next day after, for the third chest, when Mr. Kennedy, who was superintendent of Castle Garden, took away the check, and refused to give it to her, and she never got the

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third chest or the check. The third chest contained the property described in the complaint. Plaintiff showed that under the sixth section of the laws of 1855, the commissioners of emigration were authorized and empowered to designate the landing place for emigrants at the city of New York. It was admitted by the counsel for the defendants, that the defendants had, by virtue of authority given them, selected Castle Garden as such landing place, and were in possession of it for such purposes at the time plaintiff and her baggage were landed there. It was proved on the part of the defendants, that during the summer of 1857, the passengers were landed at Castle Garden from the emigrant ships, from steam-tugs hired by the railroad companies, and they paid the officers that controlled the landing of such passengers; that the employees of the commissioners had no control of the baggage of emigrant passengers in the year 1857. It was further proved (on cross-examination of defendants' witness), that after passing Quarantine, the law gives the commissioners of emigration the control of the ships arriving with emigrant passengers at the city of New York; the commissioners have the control of the ships, and can prevent runners and all other persons from coming on board. The railroad companies would not have the right to get and land emigrants unless they were authorized by the commissioners of emigration.

The defendants' counsel at the close of the testimony, requested the judge to charge the jury that the commissioners of emigration have no charge of emigrants' baggage, and are not responsible for its loss. The judge refused so to charge, but charged the jury: 1st. That the doctrine of *respondeat superior* was applicable to the case, and that the defendants were the superiors or principals (to which the counsel for defendants excepted). 2d. That the defendants are liable if the property came into the possession of the agents or employees of the defendants, and was lost by their carelessness and negligence (to which the counsel for

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the defendants excepted). The jury found a verdict for the plaintiff, for the sum of \$1288.73. And thereafter a motion was made before his Hon. Judge DALY, by defendants' counsel for a new trial, founded on the case, which motion was denied. From the order denying the motion for a new trial the defendants appealed to the general term of the common pleas, where the order appealed from was reversed with costs, and a new trial ordered upon payment of costs to appellants—Judge DALY giving a written opinion of the court. From this last order granting a new trial, the plaintiff appealed to the court of appeals.

SPENCER & SANFORD, *attorneys, and*

JOHN H. REYNOLDS, *counsel for plaintiff.*

MILLER & DEVELIN, *attorneys, and*

JOHN E. DEVELIN, *counsel for defendants.*

BALCOM J. Commissioners of Emigration were named in the law of 1847, entitled "An act concerning passengers in vessels coming to the city of New York." (*Laws of 1847, vol. 1, p. 182.*) Section four of that law declares that "The said commissioners shall be known as the Commissioners of Emigration, and by that title shall be capable of suing and being sued." The same law provides for the filling of vacancies in the office of commissioners, and for the appointment of new ones by the governor, by and with the advice and consent of the senate.

Under the authority conferred upon the commissioners of emigration by sections six and seven, of chapter 474, of the laws of 1855, they designated Castle Garden as the place for the landing of emigrant passengers in the city of New York, and they hired that garden for such purpose. But it was pursuant to chapter 579, of the laws of 1857, that they licensed the steam-tug, by which the plaintiff and her three chests of baggage were taken from the ship Ontario, which brought her into the harbor of New York.

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The owners of the steam-tug had the right to take the plaintiff and her baggage from the ship Ontario to Castle Garden, and they incurred a penalty if they did not carry the missing chest to the garden. (*Laws of 1857, p. 243, § 5.*) For the evidence shows all three of the chests were put on board of the tug.

The plaintiff was not able to find one of the chests in Castle Garden, where all three of them should have been delivered by the owners of the tug. The one she did not obtain contained the two hundred and forty sovereigns, and property in question in this action.

The judge charged the jury that the doctrine of *respondent superior* was applicable to the case, and that the defendants were superiors or principals. Also that the defendants were liable if the property came into the possession of the agents or employees of the defendants, and was lost by their carelessness and negligence.

The jury must have found that the missing chest was lost or wrongfully detained after the same came into Castle Garden, by the carelessness or negligence of superintendent Kennedy, or some other agent, clerk or servant employed there by the defendants. For there was no ground for imputing personal carelessness or negligence to either of the commissioners of emigration.

Kennedy and the other persons were employed by the defendants in pursuance of section six of the act of 1847, which authorises them to employ such agents, clerks and servants as they shall deem necessary for the purposes specified in that act, and to pay a reasonable compensation for their services, out of moneys received by the chamberlain of the city of New York, from the masters and commanders of ships and vessels bringing emigrants to that city. (*Laws of 1847, vol. 1, p. 186.*)

The defendants are public officers, and their duties are prescribed by the legislature in the several acts to which I have referred, and by chapter 219 of the laws of 1848.

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They were not liable in this case, for they were not guilty of any personal negligence. The only negligence established was that of their agents, clerks or servants. And the general rule is now firmly established, that public officers and agents are not responsible for the misfeasances or positive wrongs, or for the non-feasances, or negligences, or omissions of duty of the sub-agents, or servants, or other persons properly employed by and under them, in the discharge of their official duties. (*Story on Agency*, § 319.) I need not state the qualifications of this rule, for the defendants were not brought within any of them. They may, however, be seen in *Story on Agency*, §§ 319 a, 319 b, and *Story on Bailments*, § 463.

The position of the defendants is distinguishable from that of persons acting for their own benefit, or employing others for their own benefit. They do not act for their own benefit, or employ agents, clerks or servants for their own benefit, but for the benefit of the community at large.

The case does not show that the defendants received any compensation for their services. But if they do, the presumption is that the state or city of New York pays them.

My conclusion is, that the judge erred in holding the defendants responsible for the carelessness or negligence of their agents or employees, and that the judgment against them was properly reversed, and a new trial ordered by the general term of the court of common pleas, and that the order reversing the judgment should be affirmed, and judgment absolute rendered against the plaintiff, with costs, pursuant to the stipulation made by her in her notice of appeal to this court.

SELDEN, J., delivered an opinion, in which he came to the same conclusion.

All the judges concurring, the order for a new trial was affirmed, and judgment absolute was rendered against the plaintiff for costs.

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SELDEN J. The motion for a nonsuit in this case should have been granted, and the exception to the charge was well taken. The proof does not show that the defendants were in any way interested in the transportation or care of the baggage of the plaintiff, or that it ever came into their possession or under their control. The licensing of steamboat men and "runners," as they are called in the case, does not make the licensed persons their agents, or render them responsible for their good conduct. (*Lane agt. Colton*, 1 *Lord Ray*. 646.)

The ground, however, upon which the recovery below proceeded was, that the defendants were the principals in the transportation of passengers and baggage to the landing place appointed by them, and in taking care of the baggage when landed. This position cannot be sustained. In the first place the commissioners of emigration, in their official character, in which character they are prosecuted, have no authority to engage in such business, and if they were in a body to overstep the bounds of their official duty, and engage in such business, the responsibility which would attach to them in consequence of such business, would affect them as individuals, and not in their official character. In the second place, there is no evidence that either as a board or as individuals, they have been in any way interested in or connected with the landing of passengers or baggage, or in the care of baggage after it was landed, or have appointed any agents for that purpose. The government in assuming control over the landing of emigrants and their baggage, does not undertake, either by itself or its officers, to indemnify emigrants against fraud, but it has established the regulations which have been referred to, in the belief, doubtless, that the opportunity to commit frauds would be thereby diminished. If those regulations have failed to protect the plaintiff, it is a misfortune for which she has no remedy against the state or against the defendants. Her remedy is against the persons to whose care she

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entrusted her baggage, whose fidelity and vigilance, the government has endeavored in this instance, unsuccessfully to secure.

If any of the members of the board have failed in their duty, and the plaintiff has suffered in consequence of such failure, they may be individually liable, but the consequences of individual misconduct, if there was any, could not be visited upon the board.

The order of the general term must be affirmed, and judgment absolute for the defendants ordered, in accordance with the stipulation.

SUPREME COURT.

JANE SPRAGUE agt. HENRY J. IRWIN.

SAME agt. GEORGE J. IRWIN.

A general appearance of a defendant cures an irregularity in the summons; e. g. an indorsement upon it referring to the statute under which the action is claimed to have been brought. And the effect of the appearance is the same, although the defendant did not know of the irregularity when he appeared.

In an action under the statute, (§ 7, Art. 1, Tit. 6, ch. 8, Part 8, of the Revised Statutes,) for willful trespass on land, it is not necessary to indorse the summons with a reference to that statute, because the statute does not give the action, it merely creates a forfeiture of treble damages, where the testimony warrants such damages.

Onondaga Special Term, April, 1864.

MOTION by the defendants in the above cases, to set aside the complaints on the ground viz: That the complaints therein set forth causes of action for a forfeiture, under §§ 1 2 and 3, of title 6, chapter 5, part III, of the 5th edition of the Revised Statutes of the State of New York, entitled, "of trespass on lands," and that there is no indorsement upon the summons herein, in accordance with the provisions of § 7, article 1, title 6, chapter 8, part III,

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of the Revised Statutes of the state of New York, entitled, "of actions for penalties and forfeitures." Both complaints are for trespass on the lands owned by the plaintiff, claimed to have been wilfully committed against the provisions of said statute "of trespass on lands," and demanding judgment for treble damages, according to the provisions of said statutes.

The summons were served without the complaint, and a notice of retainer and general appearance, was served on plaintiff before service of complaint.

GEO. B. GILLESPIE *opposing motion, preliminarily objected.*

That defendants not appearing specially for the purposes of motion, but generally and without restriction, waived all irregularities in the summons, if any. (*Citing Webb agt. Mott*, 6 How. Pr. R. 439; *Baxter and al. agt. Arnold and al.* 9 How. Pr. R. 445.) (Point reserved.) Urging that upon the merits of the question the summons was not required to be indorsed for that,

1. By vol. 3, R. S., p. 784, § 7, 5th edition, every process issued for the purpose of compelling the appearance of the defendants in an action for any penalty or forfeiture, it is required that the process shall be indorsed with a general reference to the statute by *which such action is given*; that this statute is only applicable to such actions as are *created or given* by some statute; that unless the statute "of trespass on lands," gives the action, it cannot and should not be referred to by indorsement upon process, but that if the requirement existed under the Code, it could only exist in such actions as for penalty for violations of the excise law and the like actions, for penalties and forfeitures created and given by the statute; that the act entitled "of trespass on lands," does not enact the right to sue, but simply says in substance, that if the jury find the trespass willful, the measure of damages shall be greater, to wit:

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trebled, and recoverable in an action of trespass, which action is as ancient as the law itself, and by no means intended to be given or created by the statute in question. Hence the statute at most fixes the measure of damages in trespass, accompanied by malice.

2. It is well settled that a public statute need not be pleaded. Hence the action of trespass is maintainable without pleading the above statute; and if the facts proven come within the provisions of the statute, we could move to have our damages trebled.

3. The defendants are in no manner aggrieved, having full notice in the complaint of what they are to meet upon the trial.

DELOS GARY, *for motion.*

Contended that the action was for a forfeiture given by the statute, and that being ignorant of the cause of action at the time of service of summons without the complaint, a general appearance should not create a waiver of irregularities in summons.

MORGAN, J. I think the general appearance by the defendant cured the irregularity, if there was any, in the summons. The fact that the defendant was ignorant of the irregularity when he appeared in the action, is not a sufficient answer. (*See cases cited by CRIPPEN, J. Webb agt. Mott, 6 How. Pr. R. 441.*)

I am also of opinion that it was not necessary to indorse the summons with a reference to the statute under which the plaintiff desires to recover treble damages. The statute creates a forfeiture, but does give the action. The plaintiff is entitled to recover his actual damages, notwithstanding his claim to treble damages, the amount depending upon the evidence, which may or may not show that the trespass was willful within the meaning of the statute. The motion is therefore denied in each case, with \$7 costs of opposing

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the same, as against each defendant. On filing this decision, a rule may be entered with the clerk of Cayuga county in conformity to it.

SUPREME COURT.

DAVID MCCORD agt. WILLIAM M. WOODHULL.

In an action upon promissory notes made by the defendant, while a *resident of New Jersey*, more than six years prior to the commencement of the action, he cannot set up the *statute of limitations* as a defence; although for the last seven years he came from his residence in New Jersey every morning except Sundays, openly and publicly to the city of New York, where he did business during the business hours of the day, as a clerk or merchant, and returned to his residence every evening.

New York Special Term, April, 1864.

THE defendant was a resident of the state of New Jersey in 1852, when he made the notes in suit, and he was a resident of that state in 1853, when the notes became due, and he has since continued to reside in that state. The payee named in the notes, and the plaintiff, are residents of this state, and have been from the time the notes were made.

BALCOM, J. More than six years elapsed from the time the notes became due, before the action was commenced. This period was in fact nearly ten years, but during seven years of it the defendant came from his residence in New Jersey, every morning except Sundays, openly and publicly into the city of New York, where he did business during the business hours of the day as a clerk or merchant, and returned to his residence every evening, where he staid nights with his family.

The former supreme court of this state held in *Burroughs agt. Bloomer* (5 Denio, 532), that the time spent by a debtor

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in this state upon business, while residing abroad, is not to be taken into the account in determining whether the action is barred by the statute of limitations.

This is a sensible and practical rule, and its application to this case removes all the difficulty in it.

I take it to be clear, if the plaintiff had sued the defendant upon these notes in New Jersey, the statute of limitations would have been a good defence to the suit, and that the plaintiff could not have avoided the defence by proof that the defendant had done business in this state during business hours six days in every week for seven years after the notes became due, before the commencement of the suit.

Again, if the defendant had resided all the time in this state, from the day the notes became due, but had spent the business hours of six days in every week for seven years, in New Jersey, the statute of limitations would have been a valid defence to this action. (*See Chainé agt. Wilson*, 1 *Bosworth*, 673; *affirming S. C. at Sp. Term*, 16 *How. Pr. R.* 552.)

As I construe section 100 of the Code, the statute of limitations is not a defence to an action on a promissory note or other contract not under seal, unless the defendant has been six years within this state after the accruing of the cause of action, and before the commencement of the action. I do not mean that he must be every moment in this state during the six years. For no notice is to be taken of occasional temporary absences, or of parts of days he may be out of the state.

When a defendant is a resident of this state at the time the cause of action accrued, but is then out of the state, the six years do not begin to run until he returns into this state. Hence in such a case, a defendant may be a resident of this state more than six years after a cause of action accrues against him, before being sued, and not be

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able to defeat the action by setting up the statute of limitations as a defence.

The following cases show a defendant must be six years within the state, saying nothing of mere temporary absences, after the accruing of a cause of action against him, in order to avail himself of the statute of limitations as defence to such cause. (*Cole* agt. *Jessup*, 10 *N. Y. Rep.* 96; *S. C.* 10 *How. Pr. R.* 515; *Cutler* agt. *Wright*, 22 *N. Y. R.* 472; *Ford* agt. *Babcock*, 2 *Sand. S. C. Rep.* 518.)

According to the opinion of the N. Y. superior court in the case last cited, the rule is subject to the modification, that where a defendant, against whom the statute has begun to run, is a resident of the state, and continues to reside therein, his occasional absences are not to be deducted in computing the statutory term. This is in harmony with the rule laid down in *Burroughs* agt. *Bloomer* (*supra*), that the time spent in this state upon business, while residing abroad, is not to be taken into the account in determining whether a defendant has been in this state a sufficient length of time after the accruing of the cause of action, before the commencement of the suit, to bar it.

The defendant not having been in this state six years, within the meaning of the statute (§ 100 of the Code), after the causes of action mentioned in the complaint accrued, before the action was commenced, the defence of the statute of limitations cannot prevail, and the plaintiff must have judgment for the amount due upon the notes in suit, with costs.

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SUPREME COURT.

THE STATE BANK OF TROY agt. THE BANK OF THE CAPITOL.

Where a bank receives, as collecting agent, from another bank, a draft or promissory note for collection, the former bank in the absence of an express agreement or usage to the contrary, is not bound to notify and duly charge all the *prior parties to the paper*. Its duty is performed by giving reasonable notice of non-payment to its principal only.

Albany General Term, December, 1863.

HOGEBOOM, PECKHAM and MILLER, *Justices*.

EXCEPTIONS heard in the first instance at the general term.

J. ROMEYN, *for plaintiff*.

IRA SHAFER, *for defendant*

By the court, HOGEBOOM, J. This action is brought by the plaintiff against the defendant, to recover damages for defendant's negligence in the protest of a draft sent to it for collection by the plaintiff.

The defendant was the plaintiff's collecting agent at Albany, where the draft was payable. It was drawn by Oramel Brewster on Arland Carroll, and payable to the order of W. C. Watson, and indorsed by him and by John Roth & Co., to David Dater, who was the owner thereof, and who indorsed and delivered it to the plaintiff for collection, and the plaintiff, through its cashier, thereupon indorsed and delivered it to the defendant, who was located at Albany, for collection.

Payment of the draft was duly demanded but not made, and thereupon, the defendant in due season, sent notices of protest to the plaintiff, for itself and all the previous parties to the draft, directed to them in their proper names, except W. C. Watson, whose name was Winslow C. Watson, but who was described in the notice of protest as Wm. C.

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Watson. The notices to the indorsers, received by the plaintiff from the defendant, were seasonably forwarded by the plaintiff and reached them. That directed to Wm. C. Watson, came to the hand of the indorser W. C. Watson, at Port Kent, where he resided, and to which place the notice had been forwarded by the plaintiff. Dater being the owner of the draft, prosecuted some or all of the previous parties to the paper, including the acceptor, but they were insolvent except Watson, and he was defeated as to him by reason of the misdirection in the notice of protest.

Dater thereupon prosecuted the plaintiff, into whose hands he had placed the draft for collection, for negligence and improper protest of the draft as to Watson, and recovered. That recovery embraced not only the amount of the draft and interest, but the costs both of the prosecution and defence, in the suit of *Dater agt. Watson*, which Dater had paid, and which suit Dater had given the plaintiff notice to defend.

The plaintiff thereupon brought this action against the defendant for like negligence, and improper protest of the note, and having given the defendant notice of the previous suits of *Dater agt. Watson*, and *Dater agt. The State Bank of Troy*, during the pendency thereof, was permitted to recover :

1. The amount of the draft and interest.
2. The costs of the suit.
3. The costs both of the prosecution and defence of the suit of *Dater agt. Watson*.
4. The costs both of the prosecution and defence of the suit of *Dater agt. The State Bank of Troy*.

The rulings at the circuit were, it is evident, designed to be liberal in favor of the plaintiff, to the end that if the plaintiff was entitled to recover for all, or only a portion of these items, the amounts of which were readily ascertainable from the evidence, a new trial might be avoided if possible, and the verdict properly corrected, if necessary, as

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to amount, or if not, or the defendants were entitled to a verdict, that a single new trial would be sufficient to adjust the rights of the parties according to law. The exceptions to evidence and to the charge of the court, are presented in so many various forms as to make this practicable.

To dispose of this case correctly, it is of importance to see in the first place, what was the precise duty and obligation of the defendant.

It was the plaintiff's collecting agent at Albany, and received the draft in question for the purpose of collection.

Ordinarily, it is claimed, on the part of the defendant, this duty is satisfied by a demand of payment, and in the event of non-payment, seasonable notification of that fact to its principal. (*Edwards on Bills*, 476; *Mead agt. Engs*, 5 *Cow.* 303; *Bank of U. S.* agt. *Davis*, 2 *Hill*, 451; *Spencer agt. Ballou*, 18 *N. Y.* 327; *Farmers' Bank of Bridgeport agt. Vail*, 21 *N. Y.* 485.) It had no interest in the draft itself, and had contracted no obligation to any of the other parties to the draft.

It was its duty to notify the plaintiff without delay of the non-payment of the draft, in order that the plaintiff might seasonably notify the previous parties to the paper. The time allowed to the defendant for this purpose, was the same that would have been allowed to the defendant if it had been the actual owner and holder of the paper. For the purposes of protest, a collecting agent occupies the position and is held to the obligations of a holder of commercial paper. (*Mead agt. Engs*, 5 *Cow.* 303; *Howard agt. Ives*, 1 *Hill*, 263; *Bank of U. S.* agt. *Davis*, 2 *Hill*, 451; *Far. Bank of Bridgeport agt. Vail*, 1 *N. Y.* 487, 488; *Ogden agt. Dobbin*, 2 *Hall*, 112.)

As the ultimate indorsee (if it had owned the paper itself), it would have been entirely at its own option whether to give notice of protest only to its immediate indorser, or to all the previous parties to the draft, or not to give any notice at all. In such event as last suggested, the drawer

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and all the indorsers would be discharged, and the acceptor alone held, on due demand of payment from him.* If satisfied with the responsibility of the last indorser, a demand of payment and notice to such last indorser, would have been sufficient. As collecting agent for the plaintiff, its duties were somewhat different, and dependent upon the express or implied contract which it had made with the plaintiff. It had made no contract with any other person.

If the contract with the plaintiff was to demand payment of the note, and notify all the parties of the non-payment, such contract must of course be fulfilled. Such a contract is sometimes made in express terms, and sometimes it is implied from custom and usage, and the course of business. (*Smeedes agt. Bank of Utica*, 20 John. 372; 3 Cowen, 662; *Edwards on Bills*, 475, 476.) In such case, it is of course obligatory. Whether in the case of a bill or note sent for collection merely, and in the absence of an express contract as to the precise duty to be performed, the presumption of law is that the corresponding or collecting agent will take the necessary steps to charge all the parties to the paper, is a question of much embarrassment, and not, I think, as yet clearly settled in this state. I am inclined to think that in such case (there being no proof of express contract or usage), it is not obligatory on the corresponding bank to notify and duly charge all the prior parties to the paper.

I state this proposition as on the whole, the result of the adjudications in this state, although it must be confessed, that for a case so likely to occur, and to require the existence of a clear and well established rule, the cases are far from uniform. In *Mead agt. Engs* (5 Cow. 503), the suit was against an indorser, to whom notice of protest was sent from the next preceding indorser, after an interval of some days had occurred in transmitting subsequent indorsements, though in each case it had been sent to the next preceding indorser the day after it had been sent to his

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indorsee. The court laid down this rule : One, to whom a bill or note is indorsed as agent to collect, (*e. g.* a bank), is a holder for the purpose of giving and receiving notice of non-payment, and he is not bound to give notice of non-payment directly to all prior parties, but may notice his next immediate indorser, who is bound to notice his indorser, &c.; in the same manner as if the bill or note had been negotiated for a valuable consideration.

The plaintiff had offered evidence that it was the custom of New York banks, which received bills or notes for collection, to give notice of non-payment directly to all prior parties. This evidence was excluded, and as the supreme court held, properly, as not being material. They say : "the evidence of custom which was rejected by the judge, was in no respect material. It is prudent, and probably customary, for the holders of bills of exchange, to give notice of their dishonor to all the parties to the bill. They may not wish to run the hazard of some of the parties being discharged by the omission of such notice. But if the holder is satisfied with the responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party, and if such notice is given by the other parties to the bill, the holder may recover against any of them." In *Howard agt. Ives* (1 *Hill*, 263), and *Bank of the U. S. agt. Davis* (2 *Hill*, 451), the same general principle is recognized, that an agent holding paper for collection, is a principal for the purpose of transmitting notice of protest.

The original or head note of the latter case, contains this proposition : Where a bill or note is indorsed by the holder and sent to an agent for collection, the latter need not give notice of dishonor to all the parties, but it is enough if he notify his principal, who may charge the prior parties, by giving them notice himself, and this, though it appear that had the notices been sent by the agent they would have been received sooner. Other cases in our own courts affirm the same general doctrine, and they appear on

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their face to state in unqualified terms, that the duty of the collecting agent is discharged if he seasonably notify his own principal.

But it is proper to observe, that they seem to be cases where the question arose between the holder and an early indorser, and the right of recovery turned upon the point whether such indorser could be charged by consecutive notices on successive days from each indorser to his next preceding indorser, and the question did not arise between the holder of the paper and the collecting agent to whom it had been sent for collection, where the right of recovery turned upon the nature of the contract which such agent made with his principal; whether such contract was to notify only his principal, or all the previous parties to the paper. This latter question, however, arose directly in the case of *Smeedes* agt. *The Bank of Utica*, (20 Johns. 372;) *S. C. in Error* (3 Cow. 662).

It was an action of assumpsit against the bank to recover damages for default in notifying all the indorsers. The general proposition is thus stated in the head note of the case: "Where a promissory note is indorsed and delivered to a bank for collection, there is an implied undertaking on the part of the bank, in case the note is not paid, to give notice of the default of the maker to *all the indorsers*." It is to be noticed, however, that the plaintiff in order to support his cause of action, proved that it was the uniform custom and established understanding of banks to give notice to all the indorsers. There was no contradiction to this testimony, and on the strength of it the plaintiff recovered. The court said (*p.* 378), that they thought they might take judicial notice of this general custom and understanding, but that at all events it was fully proved in the case. The case was affirmed in the court of errors, although there the question turned mainly on the point whether a sufficient consideration for the undertaking of the bank was alleged and proved.

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In *Curtiss agt. Leavitt* (15 N. Y. 167), this matter is incidentally alluded to in the opinion of Justice SHANKLAND, as follows: "There is another class of obligations into which these banks can enter, and which though not expressed, are yet inferred, as incidental to the power of receiving deposits. It is that of assuming to charge indorsers of the notes of its customers, left with the bank for collection. This obligation springs out of the custom of bankers receiving such notes to collect, on the express or implied agreement that the money when collected will remain on deposit for some short time at least, for the benefit of the bank. If the bank neglects to use due diligence to charge indorsers on commercial paper thus left with it, it is subjected to the loss. This responsibility of banks has been enforced in this state in numerous instances. (20 Johns. 372; 3 Cow. 662; 11 Wend. 473; 22 id. 215; 6 Hill, 648.) In *Bank of Utica agt. McKinster* (11 Wend. 475), the question was not discussed, but the liability in a proper case was assumed to exist. The chancellor says: 'By the decision of this court in the *Bank of Utica agt. Smeedes* (3 Cow. R. 662), it was settled that the bank was liable to an action for a neglect to give notice to the indorsers, according to the usual course and practice of banks.'"

In *Montgomery Co. Bank agt. The Albany City Bank* (3 Selden, 460, 461), Judge JEWETT declares it to be "a rule of law well settled in this state, that a bank receiving a bill from the owner for collection, is bound to present it for acceptance and payment, and if not paid when presented for payment, it must take such steps by protest and notice, as are necessary to charge the *drawer and indorser*, or it will be liable to its principal, the owner, for the damages which the latter sustains by any neglect to perform such duties, unless there be some agreement to the contrary express or implied."

In the case of *Allen agt. The Merchants Bank of New York* (22 Wend. 228), Senator VERPLANCK delivering the

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opinion of a majority of the court, uses this strong language: "It is well settled in this state that there is an implied undertaking by a bank or banker receiving negotiable paper deposited for collection, to take the necessary measures to charge the drawer, maker, or other proper parties, upon the default or refusal to pay or accept. (*Smeedes* agt. *The Bank of Utica*, 20 *Johns. R.* 372; *S. C. in this court*, 3 *Cowen*, 663; *McKinster* agt. *Bank of Utica*, 9 *Wend.* 46; 11 *id* 473, *S. C.*")

These authorities on each side of this question, do not, in my opinion leave the matter free from doubt. I am inclined to think that the tendency of the latter adjudications is, in the absence of proof of any express contract or of commercial usage, to treat a mere corresponding or collecting agent as discharging its duty by a proper demand of payment, and notice of non-payment to its principal. I am the more inclined to adopt this conclusion, from the insignificant benefit or compensation usually received by banks for the performance of a service so responsible and important. I am not without doubt as to what the true rule of law is, but on a new trial, the case may, perhaps, to some extent be relieved of some embarrassment, by affirmative proof of an express contract or established custom. I think therefore the defendant's duty would have been discharged, on seasonably notifying the plaintiff of the non-payment and protest of the note.

But it undertook to do something more, and the question is, whether that is evidence of its having agreed to do something more, or if not, whether the manner of doing it was such as naturally to mislead the plaintiff, and to induce a course of conduct by the latter, which has subjected it to pecuniary liability to others. The defendant did what it was not probably obliged to do, to wit: transmit notices of protest to other parties. This might be some evidence of an agreement to notify all the indorsers, but not sufficient evidence I think, of such an agreement, in the absence

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of proof of custom or usage or of an express contract. But in sending these notices of protest, it misdescribed one of the indorsers by calling him Wm. C. Watson, instead of W. C. Watson, or Winslow C. Watson, and the plaintiff, doubtless, relying upon the correctness of the address, forwarded the identical notice sent to it. It may be claimed that the act of the defendant in misdescribing Watson, misled the plaintiff, and produced all the injurious results which followed; that as the defendant had possession of the draft, and the opportunity of inspecting the signature of the indorser, and the plaintiff had not (at the time the notice was sent), the latter had a right to rely upon the correctness of the address thus sent; that it was, in effect, a representation that such was the name of Watson in fact, or as it appeared on the paper in question. It may be that there was a question for the jury on this point, but as it was not made on the trial, and does not appear to have governed the court in the disposition of the case, I think it ought not to control us upon this occasion. It results from these observations that a new trial must be granted in this case; for

1. If there was no express or implied contract further than is shown in this case, the only notice of protest which the defendant was obliged to give, as we on the whole are inclined to hold, was that to the plaintiff, and that was seasonably sent. On such proof the defendant, and not the plaintiff, would be entitled to a verdict. The notification to the defendant of the object and pendency of the two previous suits brought by Dater, did not impose upon it the obligation to defend. Such a notice has no effect unless there be some relation or privity between the parties in regard to the subject of the litigation.

2. As the defendant had made no contract express or implied with Dater, or any of the parties to the draft except the plaintiff, it cannot be responsible to Dater or the plaintiff for his failure to recover against Watson or

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the plaintiff. It had not agreed with Dater to notify Watson of the non-payment of the note, and hence would not be responsible to Dater for not doing so. Hence it would not be responsible for the cost of the litigation between Dater and Watson.

3. Nor had it made any contract with the plaintiff to notify Watson. It was the plaintiff's own business to do so, or to notify Dater, and give him an opportunity to do so. If it had made such a contract, it would have been liable for the costs of both suits, as it was notified of the pendency of both, and had an opportunity to conduct the one and defend the other. But as it had not made such a contract, it was not liable for the costs of either litigation.

4. The foregoing suggestions are made with reference only to the proceedings as they stand in the case now considered.

If the plaintiff on a new trial shall be able to satisfy a court and jury either,

1. That there was an express contract to notify all the indorsers, or,

2. That there was an implied contract resulting from commercial usage or the course of business, or,

3. That the natural and necessary result of the misdirection of Watson's name in the notice of protest, was to subject the plaintiff to the damages sustained by it in the litigations to which it has been subjected, then the plaintiff will be entitled to recover against the defendant for such damages. The precise amount of them, as well in regard to the items of costs as otherwise, will depend upon the circumstances developed on the trial, and may, to some extent, be varied by the character or degree of the proof offered.

In what has been said, it has been assumed that Watson was discharged from liability by the insufficiency of the notice. This is in accordance with what is alleged to have been the decision of this court, in regard to this very notice,

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in some one of these prosecutions. I do not find the case reported, nor have we been supplied with the opinion of the court. As an original question, with my present views, I should have come to a different conclusion, but presuming the court gave to the question mature deliberation, and made the decision claimed, it is more appropriate, and, indeed, obligatory upon us, to conform to the views thus expressed.

There must be a new trial with costs to abide the event.

SUPREME COURT.

LUTHER FORSYTH, respondent, agt. ALEXANDER FERGUSON,
appellant.

The costs to the appellant, under § 371 of the Code (as amended in 1862), does not depend upon the sole fact that he has recovered a more favorable judgment, but whether his notice of appeal was sufficient.

Erie General Term, February, 1864.

DAVIS, P. J., MARVIN, GROVER and DANIELS, Justices.

THE defendant in this cause appealed to the county court of Niagara county from a judgment recovered before a justice, by the plaintiff, for the sum of sixty dollars besides costs.

J. L. BUCK, *for respondent.*

T. M. WEBSTER, *for appellant.*

DANIELS, J. In the notice of appeal, after stating several grounds of error affecting the entire judgment, it is alleged that "the justice adopted an improper rule of damages; the damages should be merely nominal under the evidence, if the plaintiff is entitled to any damages. The judgment should have been in favor of the defendant and against

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the plaintiff." Upon the trial in the county court, the plaintiff had a verdict for fifty-five dollars damages. The appellant claimed that he was entitled to costs, which claim was rejected by the county court, and costs were allowed to the respondent. From this order an appeal was taken to this court.

The statute controlling the question involved in this appeal, provides that costs shall be allowed to the prevailing party on judgments rendered on appeal in all cases, with the exceptions and limitations mentioned. The only exception and limitation important to consider here is that which is first mentioned in the section which provides that, "in the notice of appeal the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him (*Laws of 1862, p. 856, § 27*). For if the notice of appeal in that respect complies with this requirement, the appellant is entitled to recover costs, because the verdict upon the trial in the county court is more favorable to him than that recovered before the justice. The construction to be given to the terms used in this statute, must, to a certain extent, depend upon the object intended to be accomplished by the enactment. Before this amendment, the law required the notice of appeal to state "the grounds upon which the appeal was founded" (*Code, § 353*), which were commonly set forth in the form used in the notice in this case. By other provisions enacted with this amendment, the right is secured to the parties to try the cause in the appellate court, when the amount of the claim or claims of either party litigated in the court below exceed fifty dollars. The changes made are substantial and important in this and other respects, rendering the proceeding complicated and expensive. The object of the law in requiring the notice of appeal to state the particular or particulars in which the appellant claims the judgment should be more favorable to him, is indicated in the next sentence of the amendment. It is that the respondent

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may afterwards serve upon him and the justice, an offer to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. To prepare the case for the offer, the notice should indicate clearly to the respondent the particular or particulars in which the judgment should be modified. It is solely for his consideration and action, upon the theory that the further litigation of the matter may be thus arrested. The statute should be so construed as to render it a valuable and practicable improvement, as the legislature designed it to be. It then affords the parties an opportunity to deliberately examine their controversy after one trial and determination of it, and before they enter upon another. To secure this result, the appellant should do something more than to allege general grounds of error affecting the entire judgment. The terms used in the law, as well as the objects to be attained in its alteration require it. He must specify, separate, or distinguish in a tangible form, so that the respondent may comprehend the precise change in the judgment to which he is willing to consent. Terms of a general nature are not sufficient. The proceeding will then be plain, intelligible and valuable, affording facilities for the correction of errors, mistakes and misapprehensions, without the intervention and expense of an appellate court.

It could not be supposed from the terms used in the notice of appeal in this case, that there were any particulars in which the appellant claimed that the judgment should have been more favorable to him, but that there should be an entire reversal of it. The statement that "the damages should have been merely nominal under the evidence, if the plaintiff is entitled to any damages," does not indicate an intention to allow the judgment to stand for even nominal damages. It does not propose or claim that the judgment should be reduced to such damages. But from the notice taken, together, the import of the statement is that the judgment was wholly erroneous. To con-

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form to this section of the statute, it should be claimed unqualifiedly that the judgment should be reduced to some certain amount, or corrected in some other respects specified in the notice, as the case may require. This is very clearly contemplated by the statute. For after the offer is made and accepted, the power of the justice is limited to correcting "such judgment accordingly, and the same so corrected shall stand as his judgment," and be enforced accordingly, and the execution, if one has been issued, "shall be amended by the justice to correspond with the amended judgment." He has no power under the section to reverse the judgment, or enter one in favor of the appellant, but merely to amend that already rendered. The order appealed from should be affirmed.

DAVIS, P. J., and MARVIN, J., and GROVER, J., concur.

NEW YORK SUPERIOR COURT.

JOSEPH D. DAVIS AND FRANCIS TOSCANO agt. WILLIAM GROVE, JOHN P. KOHL, FRÉDERICK ALLISON AND ALFRED BARMORE, assignee, &c.

It may be not only bad pleading, but very embarrassing to the court, where a complaint mixes up different and separate causes of action with inconsistent prayers for relief, yet if the matters complained of arise out of a partnership transaction, the complaint may be sustained, so far as to grant an injunction and receiver.

Thus, where the plaintiffs alleged that on a joint transaction in sugars, made between them and the defendants, the defendants 1st, had received \$1,187.49 more in value of sugars from the plaintiffs than the latter had drawn bills for, and prayed judgment for that amount.

2d. That the entire profits on the sugars sold by the defendants on joint account, amounted to \$20,000, and asked judgment for one-half that amount.

3d. That the assignment for the benefit of creditors, which the defendants had made, be set aside as fraudulent and void, as to said sugars, and the proceeds thereof, and for an injunction and receiver; and

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4th. For a judgment in behalf of the owners and holders of the bills of exchange, to be paid out of the avails of the sugars on hand. These latter were strangers to the action, and mere creditors of the two firms, the plaintiffs and defendants. No prayer in the complaint for an accounting between themselves as partners.

New York General Term, February, 1864.

Before ROBERTSON, Ch. J., McCUNN and GARVIN, Justices.

THIS is an appeal from an order of special term in regard to injunction and receiver.

WM. HENRY ANTHON, *for plaintiffs.*

T. B. ELDRIDGE, *for defendants.*

By the court, McCUNN, J. The complaint in this action alleges that plaintiffs were copartners, doing business in Cuba, under the firm name of Davis & Toscano; that defendants Grove, Kohl and Allison, were copartners, doing business in this city under the firm name of William Grove & Co.; that one of the defendants, Grove, made certain representations to plaintiffs, which they now allege were false and untrue; and that induced by these false and fraudulent representations, and believing them to be true, the plaintiffs under their firm name (Davis and Toscano), entered into an arrangement with the defendants, Grove, Kohl and Allison, under the firm name of William Grove & Co., to transact a business in sugars on joint account. The business was to be transacted as follows:

Messrs. Davis & Toscano were to draw bills of exchange at sixty days, on William Grove & Co., who were to accept the same, and these bills were to be sold, and the proceeds thereof were to pay for the shipments of sugars, so bought by Davis & Toscano.

Under this agreement, they allege that they shipped to William Grove & Co., sugars to the amount of near \$65,000, United States currency, and \$1,187.49 more than they had drawn bills against.

The complaint further alleges, that before the maturity of any of the bills so drawn and accepted, William Grove

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& Co. failed (in October, 1853), and made an assignment to defendant Barmore, and that said Barmore took possession of the sugar sold, and such as remained on hand and unsold, and alleges that said Barmore is now about to sell the balance, and to distribute the entire proceeds among the general creditors of William Grove & Co., without special reference to these sugar transactions.

Then it alleges, the assignment is fraudulent and void, so far as it affects the sugars or the proceeds thereof, and the complaint concludes by a prayer for judgment against all the defendants (Barmore, the assignee, included) for \$1,187.49, and also for a judgment for half the profits, alleging that the entire profits amounted to \$20,000, and prays that said assignment be adjudged fraudulent and void as to said sugars and the proceeds thereof, and that defendants may be restrained, and a receiver be appointed; and then it prays that the holders of the bills—outside parties—parties who bought the bills on the strength of the drawers' and acceptors' names, without the slightest reference to the shipments of sugars, be paid first out of the proceeds of said sugars, and that these plaintiffs may have such other relief as may seem proper to the court, and as the nature of the case may require.

This inconsistency of prayers, and mixing of different and separate causes of action, is not only bad pleading, but very embarrassing.

1. It asks for a judgment for \$1,187.49.
2. It asks for a judgment for one-half of the profits on the enterprise, without any prayer for accounting.
3. That the assignment by defendants Grove & Kohl, to Barmore, be set aside as fraudulent and void, and for an injunction and receiver; and
4. For a judgment in behalf of the owners and holders of the bills of exchange, strangers to the action, and mere creditors of the two firms of Davis & Toscano and William Grove & Co.

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Under the first and second prayer in the complaint, if the plaintiffs made out a case of ordinary indebtedness at common law, and their accounts had been adjusted, they would be entitled to judgment for the amount proved, but in that event, they are certainly not entitled to an injunction or receiver until after judgment.

To the third prayer, for a judgment setting aside the assignment, the answer is that they cannot in this action and before judgment, obtain such relief.

To the fourth prayer, my view is that the holders of these bills of exchange are mere creditors of the two firms of Davis & Toscano as drawers, and William Grove & Co. as acceptors, and cannot be joined in this action, they having purchased said bills on the strength of the makers' and drawers' names, without reference to these shipments, are mere creditors, and must seek separate remedies.

It cannot be pretended or maintained that in such a case as this, any number of creditors can join in one action and prosecute separate claims in that suit against a debtor (unless all the claims be assigned to the plaintiff), besides the Code provides that actions must be prosecuted in the name of the real parties in interest.

If these drafts had been drawn and accepted, and the consignments had been made to meet the same, then, perhaps, the rule in the case of *Scheidt agt. Sturges, Shaw & Co.*, would have held good, and the holders of the drafts could have enjoined the disposition of the sugars, and the court would have decreed a liquidation of said bills of exchange out of the proceeds thereof; but so far from this being the case, the drafts were drawn by the makers, and accepted by the acceptors, and disposed of in the market to third parties, on the strength of the drawers' and acceptors' names, without the slightest regard or reference to these shipments. Indeed, the drafts were sold (as appears by the schedule annexed to the case), and on their

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way to maturity, before the shipments of sugars were purchased in Cuba.

If the adventure of these sugars had been brought to a final close, and the amount ascertained, or an account had been stated between the plaintiffs and defendants, then an action for a money demand on contract for the over advance and profits, if any were found due, would lie, but in that event they would be entitled to neither an injunction nor receiver.

I think, instead of an action in this form, a complaint should have been filed, alleging that this was a partnership transaction; that the credit of both parties was involved; that the joint names and credit of the two firms, Davis & Toscano, and William Grove & Co., the one as drawers of the bills, and the others as acceptors, were the means by which they procured the moneys that bought these sugars; that the same was bought on joint account, as partners in this transaction; that a large amount of the sugars and the proceeds thereof were on hand; that the joint indebtedness for these sugars was outstanding, and should be paid out of the joint property arising out of the transaction, and that an accounting should be had between the parties, and that an injunction be granted and a receiver appointed.

I am of opinion that if this course had been pursued, a proper remedy could have been obtained.

The next question to be considered is, can the complaint in the action as it now stands, be viewed in such a light as to afford the plaintiffs relief, by way of injunction and receiver and for an accounting as partners in this transaction.

I can find no allegation in the complaint that would warrant the granting of this kind of relief, unless the allegation, "to transact business on joint account," to be found at folio 9, and the allegation to be found at folio 16, "and that the profits upon such shipments, after deducting all charges, will amount to at least the sum of \$20,000, and that half of said profits absolutely belonged to plaintiffs,"

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and that the last portion of the final prayer, to be found at folio 20, "and for such further relief as may seem proper to this court, and as the nature of the case may require," can be so construed.

It is admitted on the part of the plaintiffs and defendants, that this was a joint partnership transaction, and although the complaint in the case is very inartistically drawn, yet the relief which the court may grant under section 375 of the Code (taking into consideration the allegations of the complaint I have just quoted), may not be inconsistent with the allegations contained in the complaint.

The case of *Marquat agt. Marquat (2 Kernan)*, I think justifies me in such a construction of the complaint in this action.

In that case, the defendants as husband and wife, borrowed money from the plaintiff, to enable them in part to purchase certain lands, and agreed to give a mortgage to secure the money so borrowed, on the wife's real estate, it being the property for which the money was paid.

The complaint after setting up these facts, demanded judgment "that the defendants for the purpose of carrying out the said agreement, execute a mortgage upon the real estate of the wife, and for such further or other relief as the court should deem proper."

The court held that they might give judgment against the husband for the amount borrowed under the ordinary money counts, and dismiss the action as to the wife.

On the whole, I think the complaint in this case is broad enough to enable the plaintiffs to obtain their relief, and that the receivership in the case ought to have extended to all partnership assets in the hands of the assignee Bar-more, and that the injunction order should have covered all such assets.

In order to ascertain the amount of such assets, there should be a reference to ascertain the same, unless the amount can be agreed upon, and the order at special term

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should be modified to that extent, making Murray Hoffman, Esq., sole referee for such purpose—the costs of the appeal by the defendants to be paid by them, and no costs are allowed on the appeal to the plaintiffs.

SUPREME COURT.

JUSTUS CORBIN agt. THOMAS T. MILTON.

In an action for the *recovery of possession of personal property*, where the plaintiff recovers judgment for the value of the property amounting to \$43.70, together with 6 cents damages for the unlawful taking, he is entitled to recover the *same amount as costs*; although no proceedings were taken by the plaintiff for the claim and delivery of the property under § 206 *et seq.* of the Code.

Onondaga General Term, April, 1864.

Before MORGAN, BACON and FOSTER, Justices.

THE complaint in this action was for the wrongful taking of a lot of wood from the plaintiff, and unjustly detaining the same, to the damage of the plaintiff of \$100. Wherefore the plaintiff demanded judgment against the defendant, for the recovery of the possession of said wood, or for the sum of \$80, the value thereof, in case a delivery could not be had, together with \$20, as his additional damages, and the costs of the action. The answer was a general denial. The referee found as facts, 1st. That the plaintiff was the owner of the wood; 2d. That the defendant wrongfully took and carried away said wood; 3d. Assessed the value of said wood to be \$41.25; 4th. That the plaintiff had sustained damages by reason of the unlawful taking of said property to the amount of six cents; and 5th. That the said property had not been delivered to said plaintiff, and that the same had been so disposed of by said defendant that it was not capable of such delivery. The referee also found as a matter of law, that the plaintiff was entitled to recover the possession of said property, and as a delivery

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thereof could not be had, he found and assessed the plaintiff's actual damages thereby, to be the value of the property with interest, which amounted to \$43.70, together with six cents damages for the unlawful taking thereof, and directed judgment accordingly. On the 28th October, 1863, motions were made at special term, before Hon. Justice MORGAN, by each party, for directions to the clerk of Onondaga county to tax costs in his favor, which motion was decided that the defendant and not the plaintiff was entitled to costs, and the following opinion was delivered on such decision:

MORGAN, J. The plaintiff has failed to recover fifty dollars damages in this action, nor has the referee assessed the value of the property to such an amount as will make fifty dollars with the damages added. The question therefore arises whether the plaintiff or defendant is entitled to costs. If the plaintiff recovers costs, they must be limited, as required by section 304, subdivision 4, of the Code. If he is not entitled to costs, then costs of the action should be awarded to the defendant. The ground of the plaintiff's claim is, that his action is properly one to recover the possession of personal property within the meaning of section 304 of the Code. It is admitted that no proceedings were taken by him under section 206 to obtain a delivery of the property, and for this reason the defendant's counsel contends that the action is not strictly an action to recover the possession of personal property so as to entitle the plaintiff to costs. From the peculiar construction of the complaint in the action, and the findings of the referee, as I shall hereafter show, the plaintiff must fail in his motion, without reference to this question, nor shall I undertake to decide it on this motion. I notice however, that there is one case in the books where the opinion of the judge seems to be in favor of construing the provisions of the Code in such manner as to authorize the maintenance of an action to recover the possession of personal property without

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reference to section 206 (1 *Abb. Rep.* 177). Such a construction ought not to be sustained, unless the language of the Code plainly demands it. For if the plaintiff can save himself from costs by demanding judgment for the recovery of the possession of personal property, and recover costs to the amount of the value of the property, all he has to do is to frame his complaint in that form, and go to trial as in an action of trespass or trover, without the inconvenience of giving an undertaking, or taking any other preliminary proceedings to obtain the possession.

But the complaint in this action alleges the wrongful taking of the property of the value of eighty dollars, and demands a judgment "to recover the possession or the sum of eighty dollars, the value of the property, in case a delivery cannot be had, together with twenty dollars as additional damages." No wrongful detention is alleged, nor has the referee found in his report that the property was wrongfully detained, nor has he assessed any damages for the wrongful detention of the property. He says, however, that the property has not been delivered to the plaintiff, and is so disposed of that it cannot be. He assessed the value at forty-one dollars and twenty-five cents, and the damages for the unlawful taking at six cents. He then found "as matters of law, that the said plaintiff is entitled to recover the possession of the said property, and as a delivery thereof cannot be had, I find and assess the plaintiff's actual damages thereby to the value of said property with interest, which amounts to forty-three dollars and seventy cents, together with six cents for the unlawful taking thereof, and I do order and direct judgment accordingly." It seems to me that the referee has good naturedly said more in his report than was necessary or proper, probably to accommodate the plaintiff's counsel, and give him an opportunity to apply for costs. It will be impossible however, on this finding to enter up a judgment as in an action to recover the possession of personal property, for the Code

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prescribes that the judgment must be in the alternative, that the plaintiff recover the possession of the property, or the value thereof, in case a delivery cannot be had, together with damages for the detention thereof. (*Sec. 277 of the Code, and see Fitzhugh agt. Wiman, 5 Seld. 558.*) The complaint, in my opinion, is not framed properly to obtain the relief sought. (*See 1 Abb. Rep. 178 supra; 7 How. 236.*) But if it was, the report of the referee does not authorize a judgment as in case of an action to recover the possession of personal property. To authorize such a judgment it must be found that the property is unjustly detained; not merely that it had been wrongfully taken; and strictly speaking damages must be assessed for the unjust detention, before the plaintiff is authorized to enter up his judgment for the costs (*See 23 How. R. 164*). The defendant and not the plaintiff is entitled to costs.

Let an order be entered accordingly.

From this decision the plaintiff appealed to the general term.

S. N. HOLMES, *for plaintiff*.

I. This action was brought by the plaintiff to recover the possession of a quantity of wood owned by the plaintiff, which had been wrongfully taken and carried away by the defendant.

II. The complaint alleges the wrongful taking and detaining of said wood by said defendant—the ownership by said plaintiff, and his claim to recover the possession thereof, &c—and in case a delivery could not be had, then to recover the value of said property, &c. The answer is a general denial.

III. Actions of replevin under the old practice, were of two kinds, one in the "*cepit*," the other in the "*detinet*." The complaint herein would formerly have been a declaration in the "*cepit*." (*Code, 261; Abb. Pl. and Forms, 351.*)

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IV. The kind and form of an action is determined by the complaint, and interlocutory proceedings in no wise determines or affects its character. (1 *Coms.* 223; 4 *Barb.* 596; 1 *Abb. R.* 178; 18 *How.* 94; 5 *Hill*, 177.)

V. The alleged defect of the complaint, as pointed out by the judge in his opinion, must have been from a defective copy of the complaint furnished the court by defendant's counsel.

VI. If the referee erred in the form of his report, or omitted to state any fact material in his report, the report should be sent back to him for correction.

VII. If the referee has found any unnecessary facts in his report, that would in no wise vary the form of the judgment in said action, or the execution issued thereon, it will not affect the judgment, for the judgment must be made in conformity to the complaint upon recovery; if not, a motion would lie to correct the judgment.

VIII. The plaintiff having recovered in the action, the defendant is not entitled to costs, and the only question is how much costs the plaintiff is entitled to upon such recovery. (14 *Abb.* 185; 23 *How.* 44; also 164; 30 *Barb.* 426; 19 *How.* 110; 9 *Abb.* 361.)

IX. The damages actually sustained by the plaintiff by the wrong of the defendant, as found by the referee, is \$43.76, and therefore under the Code the plaintiff is entitled to recover, at all events, \$43.76 costs (*Code*, § 304).

SMITH & MARKHAM, *for defendant.*

I. The papers show that no proceedings were ever taken for the claim and delivery of the property in question. The action was commenced by the service of a summons for relief. Defendant appeared by his attorneys. Plaintiff then served this complaint, in which he claims for the return of the property. Upon this state of facts, the defendant claims that the plaintiff not having complied with

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the provisions of the chapter for the claim and delivery of property, he cannot upon the trial, have a verdict or report for the return of it, and cannot claim costs as in such a case.

(a) Before the Revised Statutes a party could have his writ of replevin, whereby he could secure the immediate delivery of the property, or his action of detinue, whereby he could have delivery by the judgment. (*See 3 Bouvier's Institutes*, 642; *3 Blackstone*, 152.)

By the statutes the action of detinue was abolished (2 R. S. 553, § 15, *marginal paging*), and the action of replevin enlarged in its scope, and made to cover all cases where the plaintiff claimed to recover the specific personal property. No one ever heard of a claim for a judgment in such a case under the Revised Statutes, unless all the provisions of the statute had been complied with. Parties were held to a strict compliance (*Middleton agt. Selge*, 6 *Hill*, 623).

(b) The provisions of this chapter of the Code are declared to be a substitute for replevin, and in contingencies not provided for, the old practice is to be resorted to. (*Roberts agt. Randall*, 5 *How.* 327; *3 Sand. S. C.* 707; *Rockwell agt. Saunders*, 19 *Barb.* 481; *Chappel agt. Skinner*, 6 *How.* 339; *Brockway agt. Burnap*, 16 *Barb.* 314; *Wilson agt. Wheeler*, 6 *How.* 49.)

The language of the Code is equally strong and conclusive, and forbids the idea that plaintiff can secure the possession of his property in any other way. Section 206 provides that the plaintiff in such an action, may, at the time of issuing the summons, or at any time before answer, claim an immediate delivery of the property as provided in this chapter. This is a clear limitation both as to time and mode of procedure. Section 207 prescribes the necessity and form of the affidavit. The other sections complete the outline of the whole practice. It is designed to afford a complete remedy—limits its operation and guards against its improper use. Section 261 relates to the form of the

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verdict or report, and its language clearly shows that no other mode of procedure is contemplated.

(c) There are good and substantial reasons in the law, why a party who seeks the return of property should be compelled to make the affidavit under section 207. Subdivision four was mainly designed to protect certain public officers who have taken property which they ought not to be compelled to return, and which public policy forbids that they should be compelled to return. But if this practice is allowed, that subdivision can be completely evaded.

II. If this is not such an action for claim and delivery as the law contemplates, then it is simply an action of trespass, for the wrongful taking of the property. In that case defendant would be entitled to recover full costs under section 304, as the same have been taxed by the clerk, and inserted in the roll.

Defendant claims that this was not replevin but trespass, and that the order directing taxation of his costs should be affirmed.

By the court, BACON, J. The complaint in this case is for the wrongful taking of personal property, alleging its detention by the defendant, and claiming judgment for the recovery of the possession thereof, or its value, if delivery can not be had, together with damages. It would have been a good declaration in the former action of replevin in the *detinet*. The referee finds the value of the property to be \$43.70, and the damages six cents. This is really his finding, although he has purported to assess what he calls the "actual damages," at the value of the property. The only judgment that can be entered on the report is that the plaintiff recover possession of the property, or for the value thereof, in case a delivery cannot be had, together with damages for the detention (*Code*, § 277). In this case the property was not delivered to the plaintiff upon the commencement of the suit, and has been so disposed of

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that delivery cannot now be had, so that the result will practically be a judgment for the value, and the six cents damages found by the referee.

The question then is how are the costs to be disposed of. Is the defendant entitled to tax costs against the plaintiff, or is the plaintiff entitled to costs, and if so to what amount? This is to my mind very clearly settled by the fourth subdivision of section 304 of the Code, which provides that in an action to recover the possession of personal property, if the plaintiff recover less than \$50 damages, he shall recover no more costs than damages, unless he recover property, or the possession be adjudged to him, the value of which, with the damages, amounts to \$50. The case of the plaintiff comes within the category, where having failed to prove the value of the property to be with the damages, equal to \$50, he can recover no more costs than damages. The defendant is not entitled to costs, because they are by section 305 given to him only in those cases where the plaintiff is not entitled to recover them. The New York superior court held this to be the rule in two well considered cases, and I agree fully in the conclusion arrived at by that court in the cases referred to. (*See 9 Abb. 361; 14 id. 185.*)

It is conceded in this case that no proceedings were at any time taken by the plaintiff for the claim and delivery of the property to him, pursuant to section 206 &c. of the Code, and upon this ground the defendant's counsel insists that the plaintiff cannot have a judgment for the return, and consequently is not entitled to costs. This ground was taken upon the motion at special term, and the learned justice seems to favor this view, although he has not put the decision upon this ground, but upon the construction of the complaint and the report of the referee, from which he concludes that this was purely an action of trespass. The complaint, he says, alleges the wrongful taking of the property, but does not allege any wrongful detention. It

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is clear that the judge was misled, probably through an inadvertancy of the copyist, by an omission of this part of the complaint in the papers furnished to him, for in the copy now furnished to the court, and which is conceded to be correct, that averment is specifically made, and the complaint is clearly one adapted to the case of an action under the Code for the recovery of personal property.

It is not imperative upon the plaintiff to make the claim for delivery, and furnish the security provided by sections 206 *et seq.* of the Code. The language is he "may" do this at the time of issuing the summons or before answer. These provisions were intended to give a privilege or election to the plaintiff, since there doubtless would arise cases where the property was of such a peculiar character, that neither its value, nor any damages that might be awarded for its detention, would afford the true owner any compensation for its loss or permanent deprivation, while in others such an amount would afford a full indemnity; or he might be willing to wait, and run his chance of restitution upon the final judgment.

Such is the construction given to these sections by Judge CLERKE, of the first district, in the case of *Vogel agt. Babcock* (1 *Abb.* 176). The language of the Code, he says, leaves it optional with the plaintiff to take the course prescribed in section 206, and if he does not seek the delivery which he can at the beginning or during the progress of the suit obtain, by making the affidavit and giving the security therein provided for, he may still, in the ultimate judgment, ask for the return. If the plaintiff is willing to give the security, he can have the return; if he be either not willing or not able to do so, it deprives him of no benefit, and gives the other party no special advantage. There is no more reason why a plaintiff should give any particular security in this action, than in an ordinary action of assumpsit upon a promissory note, unless he asks that the property be placed in his hands before the termination

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of the litigation concerning it, and then it is right that the other party should have the indemnity these provisions of the Code contemplated. That is the whole object and effect of these sections, and a compliance with them, or the omission of the plaintiff to make the claim under these sections, has no bearing whatever, in my judgment, upon the question of costs.

The report of the referee is not precisely in the form it should have been to authorize the judgment to which the plaintiff is entitled, and it should perhaps be amended by striking out that part of the finding of law that assessed the value of the property as the actual damages of the plaintiff, and declaring the six cents to be damages for the "unlawful taking" of the property, and this will authorize the plaintiff to enter the proper judgment for a return, and if it cannot be had, for the value of the property, and six cents damages for the detention, and this will entitle him to tax six cents as costs.

The order at special term should accordingly be reversed, and an order to the above effect entered, without costs of appeal to either party.

SUPREME COURT.

JOHN M. MUSCOTT agt. FREDERICK R. RUNGE.

A witness is not liable in an action for a penalty, for non-attendance on the trial of a cause, where it appears that the witness was at court on Tuesday, the day it commenced, and was paid his *per diem* fees from Wednesday to Saturday inclusive, and on Friday afternoon went home, a distance of thirteen miles (the court adjourned from Saturday until Monday); and on Saturday evening, at the residence of the witness, the party subpoenaed him, and offered him fifty cents as his *per diem* for the next Monday, which the witness refused, and neglected to appear on Monday, the day the cause was tried.

1st. The witness was entitled to his fees for his attendance on *Sunday*, as well as the other days of the week, during the sitting of the court; and the tender made by the party was only sufficient for Sunday.

2d. If the party did not choose to consider the witness as in actual attendance on the court, and entitled to pay for what the law allows for his support as a wit-

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ness, he should have suffered the witness to depart, and paid him his *mileage going and returning*, and fees for his attendance on the day he was wanted. The original service of the subpoena was defective in two particulars. 1st. No writ of subpoena was shown the witness. 2d. Nothing was paid or tendered for travel.

To entitle a plaintiff to recover in an action of this kind, he is bound to prove :

- 1st. That an action was pending in which the defendant might be a witness.
- 2d. That a subpoena was issued to be served on him.
- 3d. That it was served by delivering to the defendant personally, a ticket containing the substance of the writ, showing him at the same time the original, and paying the fees required by law to be paid, to wit: eight cents per mile from the place of residence of the witness to the place of holding the court, and fifty cents for one day's attendance.
- 4th. That fifty cents was paid to the witness for each day's attendance after the first.
- 5th. That he was a material witness.
- 6th. That he was called when the cause was reached on the calendar, and did not appear.
- 7th. The damages sustained by the non-attendance of the witness.

Fifth District, General Term, April, 1863.

Before W. F. ALLEN, MORGAN and MULLIN, Justices

THIS was an action commenced in this court by the plaintiff, as assignee of Veronica Beckler, to recover the penalty given by statute to said Beckler, and the damages sustained by her, through the failure and refusal of defendant Runge to attend as a witness in her behalf in a suit in this court against Jacob and Gotleib Burk.

Complaint served August 8, 1860. Answer served January 16, 1861.

Cause was tried at the Lewis circuit, May 28, 1862, before Hon. Justice MULLIN, and plaintiff nonsuited. Plaintiff moved for a new trial before the same justice, which was denied. The following opinion was given upon such decision :

MULLIN, J. To entitle the plaintiff to recover in this case he was bound to prove: 1st. That an action was pending, in which defendant might be a witness. 2d. That a subpoena was issued to be served on him. 3d. That it was served by delivering to the defendant, personally, a ticket containing the substance of the writ,—showing him at the same time the original, and paying the fees required

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by law to be paid, to wit : 8 cents per mile from the place of residence of the witness to the place of holding the court, and 50 cents for one day's attendance. 4th. That 50 cents was paid to the witness for each day's attendance after the first. 5th. That he was a material witness. 6th. That he was called when the case was reached on the calendar, and did not appear. 7th. The damages sustained by the non-attendance of the witness.

The plaintiff, to maintain the issue, put in evidence the proceedings in the suit of *Beckler agt. Burks*, and thus proved the first of the facts necessary to sustain the action.

He next offered the papers on which an attachment was issued against the defendant for his non-attendance at the circuit, viz : the subpoena, proof of service, payment of fees for the first day of circuit, and proof of service of subpoena for the 4th June, and the tender of 50 cents for one day's attendance, the payment of fees from day to day during the first week of the circuit, and also the attachment and the return thereof.

This evidence was objected to by the defendant's counsel, as incompetent, but the objection was overruled and the evidence received to show that an attachment was issued, and for no other purpose.

The plaintiff's counsel objected to the limitation of the evidence to the purpose received, and this presents the first question raised on the motion for a new trial. It will be seen by the terms of the offer, which is "plaintiff offered in evidence the papers on which, June 4, 1860, during the sitting of the court, an attachment was issued, &c., together with the attachment, &c.," that the object of the counsel was not to prove the papers separately, but to put in all that related to the default of the defendant, and afterwards to follow it up by proof of proceedings when the defendant was brought up on the attachment. These papers collectively did not prove any material fact which plaintiff was bound to prove in the case.

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They were not all necessary to prove that a subpoena was issued. They did not all or any of them prove that he was duly subpoenaed, or that he failed to attend. The affidavits of service and payment of fees were competent to prove those facts in the attachment proceeding, but were not competent to prove them in the action. The persons making the service must have been sworn as witnesses so that they might be cross-examined. The papers then collectively proved no material fact in the case, but they did lay the foundation for proving what was said and done when the defendant was brought before the court. For this purpose they were received, and the counsel has not shown that they were competent for any other.

The plaintiff's counsel next offered to prove that the defendant on being interrogated by the court, admitted he had been duly subpoenaed as a witness for the plaintiff in said suit, and that the only excuse for not attending was, that he (defendant) had that day (the 4th June) attended the funeral of a friend—that he did not then claim or pretend that he had not been legally subpoenaed or paid, and that the court made certain orders touching the witness and the disposition of the cause. This evidence was objected to by the defendant's counsel and rejected, and this presents the second ground relied on for a new trial.

The first branch of the offer was understood by me at the circuit as an offer to prove the admission of the defendant in the words of the offer, that he had been duly subpoenaed. So treating, I rejected it as not the legal mode of proving that a subpoena had been issued and served in the mode prescribed by the statute. But it seems that the counsel did not so intend his offer. His intention was to offer to show the due service of the subpoena, by showing by defendant's admission, that all those acts were done which made the service a legal and valid one.

When an offer is made to prove by admission, a fact which is susceptible of being admitted in the words of the

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offer, it is but reasonable to conclude that the offer embraces the terms or substance of the admission. But when the fact offered to be proved is such as is not susceptible of proof by admission in the manner indicated, then it must be taken as an offer to prove the several facts which go to establish the point or fact offered to be proved.

On the hearing on the attachment, the admission of the defendant that he was duly subpœnaed, was sufficient evidence of that fact for all purposes of that proceeding. But at the circuit, the same fact could not be proved by an admission in the words of the offer, and the admission was not legal evidence of the fact. If then the plaintiff's counsel designed to show the admission to be not in the language used, but the several acts had been done which constituted the service a legal one, it was his duty to have so stated it. In the one form the offer was competent, in the other it was incompetent. I certainly understood it as offered to prove the admission, in the language of the offer.

The branch of the offer relating to the absence of any claim of illegality in the service, was of no manner of importance in this stage of the case in which the offer was made. The plaintiff was called on to prove due service of the subpœna, not by showing that on some occasion the defendant did not claim it was not legally served, but the affirmative fact that service was made in the manner required by the statute. Had the defendant attempted to prove that he was not legally served, it might have been competent to show the absence of such a pretence on an occasion when it was quite important for him to have alleged it if he could properly do so. But for some reason wholly incomprehensible to me, the attempt at the trial was to prove the service of the subpœna, without producing the person who made the service, if one was ever made.

The order of the court on the attachment, and the order putting over the cause was subsequently proved in the case, so that that part of the offer was proved.

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We now come to the only part of the case in regard to which I have entertained any doubt. I refer to the question whether on the facts proved, the witness was in default for not attending the court on Monday, the 4th day of June.

It seems that he was paid his mileage and for one day's attendance on the 26th of May. He attended in obedience to the subpoena, and was paid his fees the 29th, 30th and 31st of May, and on the 1st day of June. On the afternoon of that day he was paid for attendance on Saturday. But he left on Friday, and did not return until he was brought up on the attachment on Monday, the 4th of June. The court adjourned from Saturday until Monday. He was not paid his per diem for Sunday, nor was his mileage paid for going to and returning from his residence.

A witness duly subpoenaed, incurs no responsibility by reason of his absence, provided he is present when called. If he absent himself so that his per diem cannot be paid to him, he cannot excuse his non-attendance on account of such non-payment, and if there was nothing in this case but the non-payment of the per diem for Sunday on Saturday, I should be of the opinion that the non-suit was improperly granted.

It was held by Justice BACON, in *Moulton agt. Townsend* (16 How. P. R. 306), that a witness is entitled to mileage to and from his residence, whenever the circuit at which he is required to attend is adjourned, or the trial of the cause postponed by consent of parties. The decision is right, but it cannot be extended so as to authorize the allowance of traveling fees where a circuit is adjourned over Sunday. It would be exceedingly oppressive to compel a party to pay traveling fees to witnesses for going to and returning from home, when they could not during the adjournment travel half the distance. But when the witness resides so near the court house that he can conveniently return home, he is at liberty to do so, and the party subpoenaing must either pay him his per diem for Sunday

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or his traveling fees. If a witness attends, having been duly subpoenaed, and is not paid his per diem, he is at liberty to return (*Courtney agt. Baker*, 3 *Denio*, 27), and his attendance can only be secured by again subpoenaing him and paying his mileage. But it is insisted by the plaintiff's counsel that it was the duty of the witness to remain at court on Saturday, so that he could be paid his per diem for Sunday, and not having done so, he was in default, and could not allege the non-payment as an excuse for not attending. As a general proposition the counsel is right, but it is quite clear that the absence of the witness was not the cause of the non-payment for Sunday. When the witness left on Friday, he told the counsel he was going home. An opportunity was then afforded to pay him for Sunday. The cause was not reached before the adjournment on Saturday, and of course the witness incurred no liability for leaving, and having notified the counsel he was going to leave, performed his whole duty.

The assignee of the plaintiff and her counsel seem to have understood that they were not at liberty to trust to the original subpoenaing and payment of fees, for on Saturday evening another subpoena was served on the witness, and fifty cents for one day's attendance was offered.

If this payment was for Sunday then Monday was not paid for, and if it was for Monday then Sunday was not paid for. So that in any contingency the service was defective. It is quite manifest that neither the plaintiff nor her counsel understood that the witness was entitled to pay for Sunday. If they had they would have paid him for two days instead of one, when he was subpoenaed on Saturday. If they did deem him entitled to pay for Sunday, it is difficult to understand why they should have taken the trouble to subpoena him on Saturday and omit to pay him for another day's attendance. They now ignore the service on Saturday, and fall back upon the fault imputed to the witness for not attending on Saturday, so as to

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be paid. If the payment on Saturday evening was for Sunday, there was no necessity for serving another subpoena on him. This service shows that the intention was to pay the fifty cents for Monday, and it was recognition that the plaintiff and not the witness was in fault. The plaintiff is seeking to enforce a remedy somewhat harsh and severe, and it is not unreasonable to require him to be strictly correct in his proceedings, and believing at the circuit as I do now, that his failure to pay the per diem for an additional day or mileage, released the witness from any obligation to attend, I non-suited him as then and now believe properly.

No point is made on this motion as to the statement of the defendant on Saturday evening, that he could attend without pay, and it is not necessary therefore to discuss it. The offer was of fifty cents only—if that was not enough, then he refused to receive less than he was entitled to, and he stated he would attend without the money. He seems to have insisted on strict practice in the service, inasmuch as he disputed the right of a person not a constable, to serve the subpoena. It is safe to infer if he was thus particular as to the service, he did not waive the payment of such legal fees as he was entitled to receive. The party making the service must see to it that he tenders all the law requires him to pay, and having tendered so much, the witness—if he declines to receive—will nevertheless be bound to attend. The motion for a new trial is therefore denied, with \$10 costs. From this opinion the plaintiff appealed to the general term.

JOHN M. MUSCOTT, *appellant in person.*

JOHN D. COLLINS, *for respondent.*

I. A new trial should not be granted, for the particular reasons stated by Judge MULLIN in his opinion at special term.

II. When a court adjourns over from Saturday till Monday, there is no court on Sunday at which a witness can in any way be required to lay aside all business and excuses,

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and attend. Hence he may go home to his family and place of worship on Sunday, if he resides within twenty miles, that being the distance which the statute allows a person to travel on Sunday (2 R. S. 936, § 66); and he may have fees for it (16 How. 306). It has been decided that per diem fees are for the sustenance of the witness (3 Denio, on p. 32); and also that a witness may have reasonable time to travel to court by the ordinary modes of public conveyance (13 Wend. 49). Hence mileage fees contemplate the expenses of travel. The defendant was offered fifty cents on Saturday, at his place of residence (thirteen miles from court), as per diem for Monday, which the complaint alleges he refused. To allow plaintiff to recover would be to hold that a witness may be compelled to bear his own expenses for Sunday, either of per diem or mileage, *volens volens*, when there is no court, and respond in damage if he fails. There is no principle of law by which such a decision can be sustained.

III. The original service of subpoena, and payment of per diem for one day and mileage, have not been proved. (a) The attachment papers did not prove this. Affidavits made for one purpose cannot be used for another; they are "*functus officio*" (8 Cow. 68). (b) The affidavits are ex parte, secondary, hearsay (1 Greenleaf's Ev. §§ 110, 98). (c) It precludes an opportunity to cross-examine the witnesses before the court (1 Greenleaf's Ev. §§ 321, 322, 323). (d) It is not the best evidence, and foundation is not laid for resorting to secondary (1 Greenleaf's Ev. § 82). Plaintiff's exception to the ruling in regard to the attachment papers is immaterial, unless those papers are sufficient to prove legal service of the subpoena, and payment of legal mileage and per diem. The attachment papers were admitted in evidence, and no exception can be heard, unless a direction was given upon it to the jury (*People* agt. Rathbun, 21 Wend. 509, on p. 548). No direction was given upon the effect of this evidence. (e) Plaintiff's offer to prove

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defendant's admission of having been "duly subpoenaed," was not competent to prove service, and legal payment of mileage and per diem fees. There was no offer to prove any admission of payment. An offer to be available here, must be specific (15 *Wend.* 502). Objections in a case must be equally definite and specific (17 *Wend.* 136). There was no evidence or offer to show how much he received, nor that defendant knew how much he was entitled to. An admission involving a legal opinion or principle, is not competent. (1 *Greenleaf's Ev.* § 96; 2 *Abbott's Dig.* 690, § 1091.) (f) Where a party makes an offer capable of two constructions, he will not be allowed to elect upon review the one most favorable to him (3 *Comst.* 47). The court and counsel understood it in the sense and words of the exception. (g) The exception is waived, by plaintiff's afterwards proving the admission offered, in the identical words of the offer (14 *Barb.* 206). Plaintiff must prove service and full payment of per diem and mileage fees, at his peril (4 *Denio*, 75). It is not enough that the witness supposed he had been duly subpoenaed or paid; or that he attended without objection (4 *Denio*, 79).

By the court, ALLEN J. The exclusion as evidence of the admission of the defendant when brought up on the attachment, "that he had been duly subpoenaed as a witness for said Beckler in said suit," was not error for which the judgment should be reversed.

1. That fact was not in dispute. The only questions were whether the fees had been paid for Monday, the day on which the cause was reached, and whether the defendant was bound to attend on that day, having absented himself from court on Saturday, so that the fees could not be paid to him.

2. The plaintiff proved all the facts attending the service and the payment of fees from day to day, and for Monday of the second week, and if they did not constitute a

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due service of the subpoena, the plaintiff's admission would not cure the defect.

3. The question was not what the defendant said in respect of the service, but the offer was general, to prove the legal conclusion of the defendant from the facts.

4. The offer was connected with the further offer to prove what defendant did not say, and what the judge thereupon said and did, which was clearly incompetent, and as the offer was in gross, and part of the evidence incompetent, the whole was properly excluded.

5. The evidence would not have affected the result, for upon all the evidence it would have been seen that the admission, if in the very words of the offer, would have only related to the original service of the subpoena, or if it could have been understood as relating to and admitting the binding force of the subpoena on Monday of the second week, it must have been made under a mistaken view of the rights of the parties, and an admission of law by a party binds him not. A confession *juris* is not received (1 *Greenl. Ev.* § 96).

II. No point can be made here upon the alleged waiver of the fees for Monday, on Saturday evening of the first week of the court. It was not urged or insisted upon at the trial, nor was there any request made to submit that question to the jury. It is evidently an after-thought. It is not mentioned in the complaint, and was not suggested on the trial. The claim then was, that the defendant had been paid or tendered his full fees, and was by law bound to attend as a witness. The waiver of the fees must be express in order to subject the witness to the penalty for non-attendance. An implied waiver is not sufficient. The witness is not bound to assert his rights upon peril of losing them (1 *Greenl. Ev.* § 311). In *Goodwin agt. West* (Cro. Car. 522), it was first doubted whether a witness could be compelled to come upon promise without charges delivered, but subsequently, in same case, same book, p. 540, it was

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held that the acceptance of less than the legal fees, and a promise to pay the residue, would bind the witness to come (*Hurd agt. Swan*, 4 *Denio*, 75).

III. The defendant was entitled to his fees for attending on Sunday, as well as on the secular days during the sitting of the court, and whether he should use the money in payment of his expenses at the place of holding the court, or in going to and from the place of his residence, is not material. If the plaintiff did not choose to consider him as in actual attendance, and pay him what the law has fixed as the proper amount to be paid for his support, he should have suffered him to depart, and paid him his mileage going and returning, and for attendance on the day he was wanted (*Moulton agt. Townsend*, 16 *How*. 306). The allowance is for the daily sustenance of the witness, and he is entitled to it from day to day, and in advance (*Courtney agt. Baker*, 3 *Den.* 27).

IV. The plaintiff can claim nothing from the fact that the defendant was not at the court house on Saturday to be sworn as a witness, or to receive his pay for the next day. Conceding the law to be as claimed by the plaintiff, he lost nothing by the absence of the defendant. He paid him Saturday evening, and tendered him what he then supposed, and now claims, was required to compel his attendance on Monday. That is all he could have done had the defendant remained at the court house. The difficulty is, the plaintiff mistook the law and the legal rights of the defendant, and the amount tendered was insufficient, as it only paid for Sunday.

V. As an original service of a subpoena, the attempted service on Saturday was defective.

1. No writ of subpoena was shown.
2. Nothing was paid or tendered for travel (3 *R. S.* 5th ed. 683).

The judgment should be affirmed.

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SUPREME COURT.

TUCKER, respondent agt. WHITE, appellant.

As an original question it is clear that the *entry of judgment* on a verdict, forms no bar to a motion at special term for a *new trial on a case*, whether it be entered to stand as security or not. (*The authorities holding to the contrary though regarded as perhaps binding until reversed, disapproved.*)

The party against whom the verdict was rendered, and who had served a case in time, allowed (notwithstanding there was no stay of proceedings, and unconditional judgment had been entered), to proceed to have the *case settled*, with a view to bringing up the question of practice in such form that it might be determined hereafter, if necessary, so distinctly as to require it to be passed upon by the court of appeals, as involving a substantial right.

Eighth District, General Term, May, 1864.

DAVIS, GROVER, DANIELS and MARVIN, Justices.

THIS was an appeal from an order of special term, denying a motion to refer it to one of the justices of this court to settle a case and amendments, by the minutes of Justice HORT, deceased, who held the circuit at which the cause was tried. The facts and particular points involved, sufficiently appear from the briefs of counsel and the opinion of the court.

F. E. CORNWELL, *counsel for appellant, made the following statement of facts and points :*

The cause was tried at June circuit in Erie county, 1863, and there was a verdict for plaintiff. Defendant thereupon, on the coming in of the verdict, applied for and obtained an order, which was entered with the clerk, giving him thirty days to make a case on which to move for a new trial. He also applied for, and according to his moving affidavit, supposed the judge gave him an order that the motion be made at general term in the first instance, intending that his exceptions should be heard at the same time. It appeared, however at special term, on examining Judge

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Hoyt's minutes, that no order sending to general term was entered by the judge on his minutes. The opposing affidavits, however, do not deny that the case was allowed to be made for the purpose of moving for a new trial. There was no order for a stay of proceedings. It seems an appeal was afterwards attempted to be brought to general term from the judgment entered on the verdict, but such appeal was dismissed, because, although notice of appeal was served in time on the clerk, it was served a day or two too late on the attorney. The dismissal, however, was without prejudice to a motion for leave to perfect the appeal.

Pursuant to the order giving thirty days to make and serve a case, a case was made and served in due time, amendments were proposed, and they were noticed regularly for settlement before Judge Hoyt, but by reason of his illness and absence, had not been settled at the time of his death. The motion for reference for settlement was denied rather *pro forma* at special term, in order to bring before the general term on this appeal the question whether a motion for a new trial on a case can be heard after the entry of a judgment, not in terms entered simply to stand as security.

The moving party below insisted that he was entitled, at all events, on the papers, to the order of reference, and that it was irregular to deny the motion on the alleged ground that after the case was settled it would be set aside on plaintiff's motion.

I. The motion should have been granted below. The case was made and served in time, and defendant was regular in his practice under the order made at the circuit, giving time to make a case. The denial of the motion amounted to giving affirmative relief to the opposing party, on papers which the moving party had no opportunity to answer. This was irregular under the settled practice. "Affirmative relief cannot be granted to a party opposing a motion, upon matter appearing in his papers which the

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other party has had no opportunity to answer" (*Garcia agt. Sheldon*, 3 Barb. 232). For instance, it was alleged by plaintiff that the case was allowed to be made for the purpose of appeal to the general term from the judgment to be entered on the verdict, and that the appeal having been dismissed as too late, the case would be useless, and therefore it should be set aside.

In reply the defendant might (and would as I understand) have shown that he intended to do both; i. e., to appeal and have his exceptions heard, and to make his motion for a new trial at the general term in the first instance, at the same time, both to be heard together. And though he should lose his right of appeal, and fail to show the order sending the case to general term in the first instance, he would still be left with the right to move for new trial at special term. He would also have shown in reply, that the judgment has been paid in full, in cash. The fact that the balance of evidence on this point, on these papers, was against this view, only demonstrates the more forcibly the danger of departing from the above rule of practice as to affirmative relief. Of course the balance would be likely to be against him on a question thus raised *ex parte*, and which he has had no opportunity to meet directly.

II. The motion should have been granted in any view of the case. The entry of judgment forms no bar to a motion at special term for a new trial on a case.

1. Under the former practice in the old supreme court, it is true this could not be done. The rules of 1799 contained the following in reference to "new trials:" (*Anthony's Appendix to Tidd's Practice*, page 70, *Rules of N. Y. Supreme Court.*) "When an application for a new trial is intended to be made, a case must be prepared, and a certificate to stay proceedings must be obtained and served with notice of motion on the opposite party; if this certificate is not obtained, the opposite party has a right to proceed and complete his judgment, and after judgment

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thus entered, the court will not hear an argument to set aside a verdict." See *Shepherd's case* (*Cole & Caines' R.* 94), decided in January term, 1800, where this rule, then new, was explained; but as the moving party had misconstrued it; it was waived by the court, and the motion for new trial was heard, notwithstanding judgment had been entered. This rule of 1799 seems not to have been strictly adhered to by the court. In *Savage agt. Hicks* (7 W. 246), "a verdict had been rendered against the defendant, who obtained an order for time to make a case, which was made. The plaintiff had time given him by order to propose amendments, which were proposed and the case settled, but no order was granted to stay proceedings after the case was settled. The plaintiff perfected his judgment and issued execution, and the defendant now moved to set aside the same for irregularity. By the court: The plaintiff has not been irregular. An order to stay proceedings after the case was settled not having been obtained, the plaintiff had a right to enter judgment and issue execution. The case, however, having been made in good faith, the proceedings on the execution are stayed until the decision of the cause."

2. In 1832, however, a statute was passed changing the whole practice in this respect, and abrogating the rule of 1799 altogether, and since that time no trace of any such rule can be found in any of the books of rules, nor in any of the reported cases of practice, prior at least to the code. The act of 1832 was as follows (*Ch.* 128, § 1):

"§ 1. Where in any personal action any bill of exceptions shall be taken, demurrer to evidence put in, case made, or notice of motion given for new trial on newly discovered evidence, and the proceedings shall not be stayed, the party in whose favor the verdict is rendered may perfect his judgment and issue execution; but it shall nevertheless be lawful for the other party to proceed to obtain a hearing before the supreme court upon the matters in question, in the manner hereinafter mentioned; and in case

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their judgment shall be in his favor, they may set aside the proceedings with the verdict, and order restitution, which may be enforced by such writs of restitution as are used in cases of reversal in error, or by motion and attachment, according to the practice of the court in cases of attachment.

"§ 2. The cases mentioned in the first section of this act, shall, in the first instance, be heard and decided by the circuit judge of the circuit in which the cause was tried, or by such other circuit judge as shall hold the courts mentioned in the fifth section of this act.

"§ 3. (Same powers given to circuit judges as possessed by justices of supreme court in like cases.)

"§ 4. (Provides for appeal on security, to courts in banc, from decision of circuit judge on the motion.)

"§ 5. (Requires circuit judges to hold terms once in three months to hear such motions.)

"§ 6. (Fixes fees of circuit judges in such cases.)

"§ 7. (Prescribes form of security on appeal from circuit judge's decision on such motion.)

"§ 8. It shall be lawful for the supreme court to make rules for the practice in cases provided for in this act."

Rules governing the practice under that act, were accordingly adopted by the supreme court the same year. They may be found in volume of rules published in 1837, *p.* 36, being rules. 78 to 81, inclusive (*See also Grah. Pr. 2d Ed. pp.* 637 to 640).

3. Under the constitution of 1846, and the judiciary act of 1847, the powers theretofore possessed by circuit judges were conferred upon the justices of the present supreme court (*Const. Art. 6, §§ 5 and 6, Laws of 1847, Ch. 280, § 22*). And the code of 1848 (the first code), section 389, provided as to the "present" *i. e.* then existing rules and practice of the court, that where consistent with that act, "they shall continue in force, subject to the powers over the same, of the respective courts, as they now exist."

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This would manifestly preserve the substance of the relief provided by the act of 1832, to be administered at special term, by the judges of the supreme court thus clothed with all the powers of circuit judges.

There is nowhere in the code any provision that prohibits the making of the motion after judgment. The rules of the court now in force, are consistent only with the construction contended for. For rule 34 of the present rules makes it regular, when it is intended to move for a new trial, or to review "by appeal or otherwise, a trial by jury, by the court or referees," to make and serve a case "within ten days after the trial if by jury," and it says nothing about a stay of proceedings. But if there is no stay, the clerk is required by section 264 of the code, to make an entry of judgment "on receiving the verdict." And at all events it is in the power of the successful party to tax costs on notice, and file roll and enter judgment in less than the ten days in all cases.

4. The decisions under the Code apparently adverse to this view, none of them hold that the mere entry of judgment prevents the hearing of a motion for a new trial on a case. The order giving leave or time to make a case, or where there is no order the force of rule 34, if case is made in ten days, prevents any judgment entered from becoming final. In *Droz agt. Lakey & Pine* (2 *Sandf.* 681), it was held that an order staying proceedings, obtained within four days, although after entry of judgment, was sufficient to prevent the judgment from becoming final, in such a sense as to cut off the right to make the motion. The note of the case is as follows: "A party obtaining a verdict is not bound to wait four days before entering and perfecting his judgment. The four days mentioned in the code, after which the judgment becomes final, are intended to enable the losing party to obtain a stay of proceedings, in reference to a case. If he obtain an order staying proceedings within the four days, he may move to set aside the verdict

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as against evidence, notwithstanding the entry of the judgment." Now it is to be borne in mind that this decision was made under the code of 1849, when section 265 read as follows:

"§ 265. Judgment shall be entered by the clerk, in conformity to the verdict, which shall be final after the expiration of four days, unless the court or a judge thereof order the case to be reserved for argument or further consideration, or grant a stay of proceedings."

In 1851 sections 264 and 265 were amended in important particulars. The provision making judgment final after four days was dropped altogether, and the following words were inserted in section 264:

"The justice trying the cause may, in his discretion, and upon such terms as may be just, stay the entry of judgment and further proceedings, until the hearing and final decision of a motion for a new trial, or to set aside the verdict or judgment upon the ground of surprise, or irregularity, or upon a case or bill of exceptions."

Now here, mixed up rather confusedly in one paragraph, two courses of proceeding seem to be provided for the unsuccessful party at the circuit. (1) He might have the entry of judgment stayed on terms, and then on his motion for a new trial the verdict would be set aside; or,

(2) He might allow judgment to be entered, and procure a stay of "further proceedings," and on motion for a new trial both verdict and judgment would be set aside, and whichever mode as to stay was followed, the motion might be "upon a case."

Thus under the amendments of 1851, we can see traces of an attempt to preserve the practice provided in the old supreme court by the act of 1832, which it will be remembered, allowed a motion to set aside the verdict on a case, notwithstanding entry of judgment, and ordered restitution, if set aside, where judgment had been in the meantime collected.

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We now come to the amendments of 1852, when sections 264 and 265 were amended so as to read as they now do (except the last clause of 265, since added, providing for review of certain judgments in the court of appeals). The amendments then made (1852) affecting the question under consideration, were the dropping altogether from section 264 of the sentence above quoted, which provided for a stay of proceedings, &c., so that the code as it now stands, contains neither the provision making judgment final after four days (dropped in 1851), nor the provision for stay of entry of judgment or further proceedings (dropped in 1852), which were originally contained in the codes of 1848 and 1849, and under which the decisions were made which indicated that an order to stay was necessary in order to prevent judgment becoming final in such a sense that you could not go behind it to assail the verdict.

We have already shown that there is nothing in the rules inconsistent with the construction claimed. On the contrary, rule 34 of the present rules, providing for making a case "in ten days after the trial, if by jury," is almost identical in language with number 34 of the old supreme court rules on the same subject. *See p. 20 of Gould's Ed. Sup. Court Rules of 1845*, being the rules in force when the practice under the act of 1832 prevailed, which in express terms authorized such a motion, notwithstanding judgment had been entered and no stay had been granted. To sum up the positions already taken, it appears :

First. That prior to 1832, there was a rule of court, but no statute, prohibiting the making of such a motion after judgment entered; but that it was a rule not inflexibly adhered to by the court, but relaxed in cases where good faith was apparent.

Second. That from 1832 to the time of the adoption of the code, an express statute and rules of the court in conformity therewith, authorized such motions, and they were constantly made before the circuit judges, at special terms

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held every three months for that purpose; and if judgment had been entered it was set aside with the verdict, and if collected, restitution was ordered.

Third. That under the code of 1848 and 1849, when a new system was being inaugurated, it was a mooted point whether this could be done, the doubt being created by the provision as to judgment becoming final after four days, and as to the provision for a stay. But that even under these provisions, though judgment were entered, if after judgment, but within four days, a stay was procured, the judgment did not become final, and the motion might be made (2 *Sandford*, 681).

Fourth. That under the code of 1851 and 1852, the four day provision, and the provision for a stay, were dropped altogether, and that as the code then stood and now stands, there is nothing in it prohibiting such a motion, but the code and rule 34 are so far in harmony with each other and with the act of 1832, and with the old rules of practice, as to allow the latter act to be applied in full force to the present practice. (18 *How. Pr.* p. 27, case of *Maloney agt. Dows*; see also *Allegro agt. Duncan*, 24 *id.* 210.)

Fifth. That rule 34 and sections 264 and 265 as they now stand, cannot be harmonized upon any other construction, since those sections authorize a motion to set aside a verdict on a case, which case by rule 34, may be made at any time within ten days, while a judgment may be entered in every case in less than six days, and there is no provision for a stay.

It seems to be the inevitable result, that where a case is made and served, as it may be by the rule without applying for leave, at any time within ten days, or where it is made within such further time as the circuit judge gives for that purpose, it must have the effect to prevent any judgment entered meantime from becoming final, or from becoming a bar to such motion on the case as is authorized by both statute and rule to be made thereon.

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It would follow that the case here having been made and served in time, the special term should have granted the motion for its settlement in the usual way. Its order denying the motion should therefore be reversed, and the motion should be granted with costs.

CHAUNCEY TUCKER, *for respondent, made the following points:*

This is an appeal from an order made at the last January special term in Erie county, denying a motion made by the defendant for leave to have exceptions settled, the justice who tried the cause having died before settlement. The action was tried at the last June circuit, and a verdict was rendered for plaintiff. The only questions raised on the trial were questions of law (*See proposed bill of exceptions and minutes of justice*).

The plaintiff's proceedings were not stayed. On the 13th of June, plaintiff perfected judgment on the verdict, and on the 22d June gave defendant notice of the judgment. No appeal was taken from this judgment within the time allowed for that purpose. The defendant served a bill of exceptions. The plaintiff served amendments before the time for appealing expired. Before the settlement, the justice who tried the cause died.

I. If the defendant would have no right to be heard on his exceptions, this court will not go through the idle ceremony of settling them (*Lee agt. Tillotson, 4 Hill, 27*).

II. After the entry of a regular unconditional judgment, the only mode of reviewing the questions raised upon the trial, and which that judgment determines, is by appeal. (*Code, § 323; Jackson agt. Fassit, 17 How. Pr. Rep. 453; same case on appeal, 21 id. 280; Gurney agt. Smithson, 7 Bos. R. 400; Soverhill agt. Post, 22 How. P. R. 393; Morange agt. Morris, 20 id. 258.*)

The section above cited provides that the only mode of reviewing a judgment in a civil action is by appeal.

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The judgment which this section provides can be reviewed by appeal, is the final determination of the rights of the parties in the action (*Code*, § 245). That determination is by the court, and is the decision of the court on the questions submitted to it on the trial. On the trial the plaintiff proves certain facts, upon which he claims he has a right to recover so much money of the defendant. The defendant claims that the facts do not establish any such right, and moves for a non-suit. The court may grant the motion. That is a final determination against the right of the plaintiff, and when entered by the clerk in the judgment book, is called a judgment. Unless some other direction is given, the clerk is required forthwith to enter this decision of the court in the judgment book.

The court may entertain a motion to reverse its decision, at the same term before judgment, or may stay the entry of judgment, for the plaintiff to apply at special term for a review. But the moment the decision takes the form of a judgment, the statute provides that the only mode of reviewing it is by appeal.

The judgment may embody many or few determinations, as more or less questions are raised on the trial, but the decisions made by the court on the trial, are all embodied in and constitute the judgment. There can be no distinction between the decision of the court made on the trial and the judgment, which is but the solemn expression of that decision.

On an appeal, the judgment as distinguished from the decision of the court on the questions presented on the trial is not reviewed. It is the decision which is expressed in general terms in the judgment, and incorporated at large in the record in the shape of a bill of exceptions, which is reviewed on appeal.

III. The defendant cannot have the decision of the court in this case reviewed on appeal. His right of appeal is barred (*Code*, § 332). The defendant brought an appeal,

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but it was dismissed on the ground that it was not brought in time. The judgment was entered June 13th, 1863. The notice of judgment was served June 22, 1863. The appeal was brought July 25th, thirty-three days after notice. The service of the bill of exceptions cannot be considered a notice of appeal, because it was served before the entry of judgment.

By the court, GROVER, J. The ground on which the defendant's motion was denied by the special term was, that the case and exceptions, if settled, could be of no possible benefit to him, for the reason that the time for appealing from the judgment had expired, and the judgment having been entered, a motion for a new trial upon the case and exceptions could not be made at special term.

Upon the papers it is clear that the time for appealing from the judgment had expired, and unless in some mode not apparent from the papers, the defendant can obtain some relief, a settlement of the case and exceptions would be useless, so far as an appeal from the judgment is concerned.

The remaining inquiry is whether the defendant can, if the case is settled, still make a motion for a new trial at special term.

The code, section 265, provides that a motion for a new trial on a case or exceptions, or otherwise, must, in the first instance, be heard and decided at the circuit or special term, unless the judge trying the cause directs the exceptions taken on the trial to be heard in the first instance at the general term, and the judgment in the meantime to be suspended, in which case the exceptions must be heard and the judgment given at general term.

As an original question I should be inclined to the opinion that the motion might be made at special term, notwithstanding judgment had been entered.

The code provides for making and settling a case upon

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which a motion may be made for a new trial at special term, and for an appeal from the order made upon such motion. But judgment may be entered upon the verdict forthwith, and if the motion cannot be made thereafter, the party may be deprived of his motion founded upon a case, unless the judge will give a stay of proceedings, and his only available remedy to set aside a verdict as against evidence, is a motion upon the minutes of the judge, made immediately upon the rendition of the verdict, before the opposite party can possibly enter judgment. I say only available remedy, for although the judge may stay the entry of judgment to enable the party to make his motion, yet it is discretionary whether he will do so or not. The same may be said of the right to move at special term upon exceptions. Although the party is entirely regular, makes his exceptions, serves and procures the settlement within the time provided by law, yet his motion may be defeated by the opposite party entering up judgment in the meantime.

It is insisted that such a motion is precluded by section 323 of the Code; that this section provides that the only mode of reviewing a judgment is by appeal. An examination of the section will, I think, show that its only object was to abolish writs of error, and substitute an appeal therefor, and not at all to interfere with motions for new trials at special term, provided for by other sections of the code. Regarding such motions, if after judgment rendered, a review of the judgment within section 323, and therefore prohibited by it, I think gives an effect not intended by the legislature, and deprives parties of rights clearly given by other sections of the code enacted at the same time.

The authorities are against this view. It seems to have been regarded by the courts that motions at special term for new trials upon cases and exceptions, could not be made after an unconditional judgment, although they might

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be made when the judgment was entered to stand as security. (17 *How.* 453; 21 *id.* 280; 22 *id.* 393; 20 *id.* 258.) These cases perhaps furnish such a current of authority as to settle the rule in this court. But this question involving a right depending upon the construction of the statutes, is reviewable in the court of appeals. The appellant might be embarrassed in presenting the question to that court in the form in which it arises upon this motion. It might be claimed that the court had a discretion upon the ground of laches of the defendant in procuring a settlement of the case, or in making the motion.

I think the better course will be to have the case settled and then presented to special term, and whatever the decision may be there upon the right to hear it, the question will be placed in a condition to be heard in the court of appeals without embarrassment.

I think the order appealed from should be reversed, and an order entered granting the motion of the appellant.

MARVIN, J., took no part in the decision. The other judges, DAVIS, P. J., and DANIELS, J., concurring.

Order appealed from reversed, and motion granted.

NOTE.—The foregoing case settles an important and somewhat vexed question of practice, so far as sound reasoning can do “as an original question;” the court still apparently yielding, or being inclined to yield with evident reluctance to the current of authority which seems to have set the other way. It is proposed in a future number to furnish a critical review of all the reported cases on the question, chronologically arranged, and to show that under the code as it now stands, the authorities are not in reality in conflict with the doctrine above enunciated, and that those cases which apparently conflict, are all based upon decisions under the code as it read in 1848 and 1849, which made a judgment “final after the expiration of four days, unless the court or a judge thereof order the case to be reserved for argument or further consideration, or grant a stay of proceedings;” whereas now the code contains no such provision, while there is a standing rule of court which says to the practitioner in effect, you may have ten days in which to make the case or bill allowed you by section 265, and may then on it move to set aside a verdict on the law or the fact, judgment or no judgment.—R.R.P.

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SUPREME COURT.

JOSIAH L. RUMERY, respondent agt. THE SYRACUSE DISTILLERY, MALTING AND BREWING COMPANY, appellants.

OLIVER STEBBINS, respondent agt. THE SAME, appellants.

DANIEL B. BRATT, respondent agt. THE SAME, appellants.

ISAIAH J. BARTON, respondent agt. THE SAME, appellants.

Where the *principals* employ an *agent* to purchase rye and barley for them on commission for cash, without limitation as to the time of the agency, or the quantity of grain to be purchased, and the agent continues to purchase of different farmers, and to ship to his principals, and to pay out to the vendors the money for such purchases as fast as received from the principals—the vendors knowing that the agent purchases for others, until a certain day when the principals revoke the agency, and agree to take the amount of grain which the agent has then purchased, which he estimates at a certain amount; the *principals* are liable to the *several vendors* who have not received their pay, for all the purchases made by the agent prior to the revocation of the agency; although the principals have paid the agent for all the grain they have received, and which they agreed to take when the agency was revoked.

The agent is the agent of the principals to *pay* as well as to purchase. But such contracts only for purchases made by the agent, prior to the revocation of his agency, as did not come within the statute of frauds, by a part delivery, or part payment, &c., could be considered binding upon the principals.

Erie General Term, May, 1864.

Before DAVIS, P. J., GROVER, DANIELS and MARVIN, Justices.

APPEAL by the defendants from judgment entered upon the report and decision of the referee, and the like appeal from seven other judgments in favor of other plaintiffs respectively, upon reports alike in substance. The differences in facts regarded as material, will be noticed in the opinion.

The referee in Rumery's case, reported for facts, in substance, that the defendants was a corporation, its place of business being in Syracuse; that one Babcock, residing at Gasport, Niagara county, occupied a warehouse on the

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canal, and for some years had been engaged in purchasing grain and produce on commission, and storing and shipping the same; that on the 2d October, 1860, the defendants employed Babcock as an agent to purchase barley and rye for them on commission; that the defendants were to furnish funds to Babcock, from time to time, as should be required to pay for the grain; that Babcock commenced purchasing barley about October 4th; that there was no express limitation as to the time within which, or the quantity of barley Babcock should purchase; that about the 9th October, the defendants informed Babcock that he might purchase a boat load (about 6,000 bushels), but acquiesced in his continuing to purchase for them until the 16th day of October, when the parties had an interview at Syracuse on the subject, and the defendants informed Babcock that they did not want but 12,000 bushels in all; that Babcock represented that he had more than that already purchased, and that 15,000 bushels would cover his purchases, and they then agreed to take 15,000 bushels; and they at that time revoked the agency of Babcock, and that he had no further authority to purchase barley for the defendants.

That Babcock purchased the barley of farmers who delivered it at his warehouse in wagons, and that October 16th, he had in fact purchased more than 15,000 bushels, a portion of which had been delivered before October 16th; that the defendants did not furnish money as fast as the barley was purchased, but paid for all that was shipped to them about the time it was shipped from Gasport, and that they received in all from, and paid for to Babcock, about 15,700 bushels; that there was a quantity purchased by Babcock still left in the warehouse, which defendants refused to accept or pay for, and for a portion of which these actions were brought; that Babcock had received prior to October 16th, about \$2,000 to pay for rye and barley, and the balance of the amount, about \$11,000 was received by him at different times down to December 10th,

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1860, and Babcock when he received money, paid to those who called, until it was paid out; that the defendants knew that Babcock was purchasing more grain than he paid for at the time; that those who sold barley to Babcock understood that he was purchasing on commission, but did not know for whom, except that they were told he was purchasing for a Syracuse company; that the plaintiffs did not sell the grain relying on the responsibility of the defendants, but expected payment in cash, and also expected, and in many instances directed Babcock to hold on to the grain until he received payment for it, and Babcock did refuse to ship the grain from time to time, until he was paid; that Babcock did not purchase grain for any one else during the time he was purchasing the grain in question for the defendants.

The referee found as a conclusion of law, that the defendants were liable to pay the plaintiffs for all the barley sold and actually delivered to Babcock before October 16th, and for barley contracted for before that time, when there had been a partial delivery or payment, so as to take the case out of the statute of frauds; that in a case where a verbal contract only had been made and no part delivery or payment before October 16th, he decided that the defendants were not liable, and the plaintiffs in such cases could not recover.

In the case of Rumery, he found the amount of barley and also rye delivered prior to October 16th, and the amount paid to him, and directed judgment for the balance \$112.54, including interest &c.

The reports of the referee in the other cases are very brief, adopting the general facts in Rumery's case, and stating any difference that existed.

The referee also reports some other findings of a negative character, and also that Bratt's barley was all delivered before any correspondence or negotiations took place between Babcock and the defendants.

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The exceptions of the defendants were to the findings of fact, and that Babcock had purchased more than 15,000 bushels of barley on the 16th day of October. In Rumery's case, that there was an agreement for the whole of the plaintiff's crop. In Barton's case, that on the 9th day of October, Barton sold to Babcock his crop of barley. In Bratt's case, that Babcock purchased his barley for the defendants after his agency commenced.

The exceptions to the conclusions of law relate to the liability of the defendants.

GEO. W. COTHRAN, *for plaintiffs.*

I. Babcock, from the 2d to the 10th of October, was a general agent, with unlimited authority to purchase rye and barley for the defendants.

1. He was to purchase for cash, and defendants were to furnish funds.

2. Defendants did not furnish money as he required it to pay for grain, notwithstanding he kept asking for it daily.

3. In fact, up to the 16th of October, when he had already purchased near \$12,000 worth of grain, of which over 15,000 bushels was barley, he had received but \$2,000, as appears by the defendants' bookkeeper's statement. And yet Tallman came on to the stand and actually swore that "we forwarded the money in advance to pay for the grain!"

4. Nothing, therefore can be claimed on account of his purchasing when he had no funds.

II. The letter of October 9th, limiting Babcock's authority to purchase one boat load of barley, from the subsequent transactions between the defendants and Babcock, did not in any way limit or abridge his authority as a general agent.

1. The proposition of law that a party dealing with an agent of limited powers, is bound to know the extent of his authority, does not arise in this case.

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2. On October 10, Babcock informs defendants that he had a boat load in then, and asks them to tell him what to do.

On the 12th he telegraphs them that he would have a boat loaded by noon.

On that day Tallman was at Babcock's storehouse, looked through the warehouse, examined the barley in it, saw Babcock taking in barley, conversed freely with him about the grain trade, and not one word about stopping him did he say. On the contrary, Babcock testifies that Tallman "told me I might keep right along and pay the same prices I had been paying." And he testified truly. Tallman testifies, "I told him I would write him in reference to further purchases."

On the 13th, Tallman wants him to hold on a little, as he is fearful Babcock will get more than he wants, and yet in answer to Babcock's dispatch of the previous day about freight on the load he was then shipping, he tells him to draw upon him for advance freight.

On the 15th, Babcock writes him that he had another boat load in, and asks defendants to inform him how much barley they will want. The answer the next day by letter was 12,000, but verbally 15,000 bushels.

Can it be claimed in opposition to all this that the letter of October 9, remained operative? It was simply ignored by the defendants and Babcock, and the defendants are now estopped from setting it up as a limitation of Babcock's authority.

The referee is most clearly right in finding that the defendants are liable upon all valid contracts made for barley by Babcock prior to October 16, and I think they are liable on contracts made subsequent to that time, and up to the letter of the 30th.

III. 1. The defendants did not merely acquiesce in his purchasing after October 9, but they authorized him, at least with the fullest knowledge of what he was doing, they

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permitted him to purchase and to hold himself out as their agent to make purchases of barley.

2. The correspondence and the interview of the 12th of October, at Gasport, show that the defendants were fully advised that Babcock continued to purchase, and the extent of his purchases as Babcock could know himself—he not being able to tell how much he had purchased, not knowing how farmers' crops that he had bought would hold out.

3. Not having repudiated his authority to bind them by further purchases—pretended though that authority might be—when it came to their knowledge that he was binding them, they are estopped as against these plaintiffs, who dealt in good faith with the man whom they held out as their agent, from denying his authority to bind them.

4. This proposition needs no authority to sustain it.

IV. When it came to defendants knowledge that Babcock was purchasing an amount largely in excess of a boat load of barley, it was their duty to have stopped him, and to have repudiated his authority. Not having done so, they ratified his acts, and they thereby became liable upon his contracts, precisely as though he had original authority to bind them. Ratification is equivalent to original authority. (*Commercial Bank agt. Warren*, 15 N. Y. 577; *Gage agt. Sherman*, 2 N. Y. 417; *Brisbane agt. Adams*, 3 N. Y. 129.)

V. The defendants except to the finding of fact that Babcock had purchased more than 15,000 bushels of barley on the 16th of October. This exception is of no avail, because,

1. It appears by "schedule A," that on the evening of the 15th, Babcock had already received 15,574.38 bushels, and as I have shown, there was a quantity then standing in bags unweighed.

2. Babcock in many instances purchased barley of the farmers by the crop, and many of such crops that he had purchased had not all been delivered on the 15th. It is

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for the defendants to show that it had all been delivered. Take Alonzo W. Freeman's barley for instance, he sold 400 bushels, and only delivered 186 23-48 bushels, when defendants refused to take any more.

3. It is wholly immaterial whether he had or had not that amount in then. The defendants are liable for all the barley actually purchased prior to October, 16, and all of these plaintiffs sold their grain prior to that time, as I shall presently show.

VI. The exception "to the conclusion of law that defendants were liable to the plaintiffs for all the rye and barley sold to Babcock," is unavailing.

1. Because there are no such conclusions of law found by the referee.

2. Because the referee has found that the defendants are not liable for any barley purchased by Babcock, where binding contracts had not been made prior to the 16th of October.

3. If the defendants' counsel meant that they except to the finding of the referee, that the defendants are liable for the barley which each of these plaintiffs sold to them and delivered to Babcock, then I answer: 1. That if they sold the whole of their barley, and delivered the whole or a part thereof to Babcock, prior to October 16, that the referee's finding is correct, for the reasons already given; and, 2. That the barley of each of these plaintiffs comes within this proposition, as I shall show in each case hereafter.

VII. There is no force to the exception "to the decision of the referee in refusing to hold that defendants were discharged by payment to Babcock."

1. Babcock was the agent of defendants, and a payment to him was no payment at all—the money remaining within the possession and control of defendants.

2. There was no agreement between any of the plaintiffs and Babcock, that he should receive pay for them (*Point VIII*).

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3. The most that can be claimed in any of the cases, is that Babcock told some of the plaintiffs that he would'nt let the barley go until they got their pay. None of the parties to these actions interfered at all with the defendants in removing the barley. The only persons who did so were Babcock and a witness—William Freeman.

VIII. And the same is true of the exception of the defendants to the decision of the referee, "refusing to hold that by the arrangement for Babcock to retain possession until he was paid, the defendants were authorized to pay Babcock."

1. The contracts of sale and the delivery of the grain to Babcock, being valid and binding upon defendants, nothing less than actual payment therefor to the plaintiffs could in law exonerate the defendants from liability to the plaintiffs.

2. Suppose the plaintiffs individually or collectively had told Babcock that he must not let their barley go until they got their pay, how could that affect the defendants' liability to pay them for their grain? A delivery to the agent was a delivery to the principal.

3. But the counsel claims that the plaintiffs agreed with Babcock that he should retain possession of their barley until he got the pay for it.

That the referee was right in refusing to hold as defendants' counsel requested, is so perfectly clear that it does not admit of argument, inasmuch as neither of these plaintiffs ever requested Babcock to not deliver. What Babcock testifies to was merely volunteered on his part, undoubtedly to pacify the farmers who were kept out of their pay by the defendants not furnishing Babcock with funds as they had agreed to do. Having failed to provide funds, this objection comes with bad grace from the defendants.

IX. The two exceptions of the defendants to the holding of the referee.

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1. That the defendants' liability is not restricted to the barley purchased on or before October 10; and,

2. To his not holding that defendants are not liable for barley delivered after the 13th and 16th, cannot prevail.

1. I have already shown that the referees' findings holding defendants liable for plaintiffs barley are correct.

2. An exception does not lie to a refusal of a referee to pass upon a question that he has already distinctly found against the party objecting. The only exceptions that are available on an appeal from a judgment entered on report of a referee, are, 1. Those taken to his rulings on the trial.

2. To his findings of fact. 3. To his conclusions of law.

The exceptions here insisted on are of neither of these classes.

X. The exception in Rumery's case, is in addition to the decision of the referee, that there was an agreement for the purchase of the whole of plaintiffs' crops, and also to the decision making the defendants liable for the rye or barley.

1. It is wholly immaterial whether there was any agreement to purchase plaintiff's crop or not, as his barley was all delivered between the 8th and 15th of October. And all of his rye, 141 16-60 bushels, has been actually delivered to the defendants at Syracuse, and accepted by them.

2. On the question of liability, I have nothing further to say.

XI. Defendants except in Stebbin's case "to the decision holding defendants liable at all, and also holding them liable for barley delivered on and after the 13th or 15th of October."

1. Plaintiff's barley was all delivered on the 9th, 13th and 15th of October.

2. This case comes within the rules of law already adverted to.

XII. In Barton's case the exceptions are similar to those in Rumery's case.

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1. Plaintiff's barley was all delivered on the 9th, 10th and 12th of October, except one load, which was weighed in on the 18th.

2. It was all purchased and delivered before October 16, and by "the crop" at that. It would seem that Babcock in all cases made his contracts for all each farmer had.

XIII. In Bratt's case, plaintiff's barley seems to have been stored in Babcock's warehouse before he was authorized to purchase for defendants.

1. Babcock says, "I purchased of Daniel B. Bratt 156.7 bushels, at 55 cents, amounting to \$90.08." Babcock under date of October 3, writes to Tallman that he had purchased some winter barley at 55 cents, and on the 5th Tallman directs him to purchase some winter barley. The grain was in Babcock's warehouse, and when he got into the market, he took it for defendants, as he never done anything but a commission business.

2. This barley must have been shipped to defendants, as it was the first in the storehouse, which Tallman swears that warehouse wouldn't hold much over a boat load. Although the evidence is not so full as it might have been, yet I don't think the referee's finding ought to be disturbed.

3. There is no pretence in the case that this barley had been purchased by Babcock before he became defendants' agent.

PRATT & MITCHELL, for defendants.

By the court, MARVIN, J. I shall for the present waive an examination of the questions raised by the exceptions, to the findings of fact, and assuming the facts as found, consider the question of the liability of the defendants to the plaintiffs, respectively.

What are these cases? It is very clear from the facts found, that Babcock was the agent of the defendants to purchase barley for them. It is equally clear that he did

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purchase of divers farmers the barley in question, and that the barley has not been paid for. It is true that the defendants have paid to Babcock an amount equivalent to all the barley and rye they received from him, and they received from him the full quantity he was authorized to purchase. It also appears that Babcock paid out the money he received to the sellers of grain. It is also clear that the purchases of grain were not made upon the credit of Babcock or of the defendants, that is, to be paid for at a future day after delivery, but the sales were understood to be for cash.

There was no limitation upon the authority of Babcock as to the quantity of barley he should purchase, until the 16th day of October, when he had purchased some 15,000 bushels, unless the instructions given to him about the 9th of October, that he might purchase a boat load (about 6,000 bushels), should be regarded as a limitation; if so, then the objection touching authority to make further purchases is obviated by the fact found, that the defendants acquiesced in his continuing to purchase for them until the 16th day of October, when understanding the purchases then made to amount to some 15,000 bushels, they agreed to take that quantity, thus ratifying Babcock's purchases to the amount of 15,000 bushels, and at that time put an end to Babcock's authority as their agent, as the referee has found.

The explanation of these facts is, that Babcock claims that his agency did not cease on the 16th day of October, and he in fact continued to make purchases, and upon the receipt of money from the defendants, he paid it out to the vendors who first called for pay. The result was that a portion of the money received from the defendants, was paid out to persons who sold and delivered barley after the 16th day of October. In other words, the money was misapplied by Babcock. The barley purchased prior to the 16th October, and not then shipped, was not kept separate

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from that purchased after the 16th. Hence, in shipping barley to the defendants after the 16th October, portions of that purchased prior to and after the 16th of October was forwarded to the defendants, and after they had received 15,700 bushels, there was a quantity (the referee does not say how much, and it is not material, but Babcock, as a witness, says, 2,000 to 2,500 bushels,) purchased by Babcock still left in the warehouse, which the defendants refused to accept or pay for.

The referee's decision is in effect that the defendants are liable to pay to the respective vendors for all the barley sold by them and delivered to Babcock, or contracted to be sold by an agreement legally binding, prior to the 16th day of October; and that they are not liable for purchases, or on contracts made thereafter. And it seems to me that the referee in so deciding has not erred.

The question is simply upon whom was the responsibility of the acts of Babcock, in paying out the money remitted to him by the defendants, to rest? Babcock was their agent to buy and to pay. The sales were for cash, and the delivery at the warehouse was upon the condition that the barley should be paid for. The contract of sale was perfect, and the defendants were liable upon it, and it is not material whether the defendants have received the specific barley of any one of these plaintiffs. The payment or remitting the money to Babcock, their agent, was not a payment to the respective vendors of the barley, and until they were paid the defendants were not discharged. All this is very clear to my mind, and the question, sometimes embarrassing, to whom the credit was given (time of payment being given), is not in the case.

It is, however, claimed by the defendants, that the vendors of the barley gave credit to Babcock. As we have seen, the referee has found that they did not sell the grain relying on the responsibility of the defendants, but payment in cash; and they expected, and in many instances

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directed Babcock to hold on to the grain until he received payment for it ; and Babcock did refuse to ship the grain from time to time, until he was paid.

From these facts, or the testimony from which the referee found them, it may have been legitimate and proper for the defendants to argue before the referee that the vendors of the barley constituted Babcock their agent to receive their pay for the barley, and it is quite probable that such argument was addressed to the referee, and that he gave it due consideration. He has, however, decided against it, and held the defendants liable, and we cannot disturb his judgment for this reason. It does not follow that the judgment is wrong from the facts found. The referee has not found that Babcock was in any sense the agent of any of the vendors of the barley, but on the contrary, that he was the agent of the defendants, and the testimony was ample to justify the finding. It shows that Babcock, from time to time, urged the furnishing of money, representing that the sellers of the barley wanted their pay, &c. The simple fact that a vendor who failed to receive payment when he applied for it to the agent, and instead of pay receives the representation that he, the agent, has not received from the principal the requisite amount of funds, should say to the agent, "hold on to the grain until you receive payment," is to my mind weak evidence to prove that such vendor intended to constitute Babcock his agent to receive the money, or to release the defendants from any part of their liability. The vendors had a right to payment before the barley should be removed from the warehouse, and the caution to Babcock not to violate their rights, was well enough. The implication might perhaps arise, that they consented that Babcock should ship the barley to the defendants upon the receipt of the pay, but even this would not relieve the defendants from their liability to see the vendors paid.

The mode of payment by the defendants was by and

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through their agent. When they furnished the money to him they had taken one step, and when he should pay the vendors for their barley, they would be discharged.

There is no foundation for the exceptions to the findings of fact in Rumery's case. It appears that his barley was all delivered on or before the 15th October, 1860.

As to Barton's case, the purchase was made and five loads delivered prior to the 16th October, and one after and on the 18th.

In Stebbin's case, the barley was delivered prior to the 16th of October.

In Bratt's case, the referee found that the plaintiff sold and delivered at Babcock's warehouse, 156 45-48 bushels of barley, at 55 cents; that a portion of his barley was left at Babcock's warehouse a few days previous to the time when Babcock's agency commenced for defendants, and after the latter time, Babcock purchased the same for the defendants. There is an additional finding that all of Bratt's barley was delivered before any correspondence or negotiation took place between Babcock and the defendants. The same general facts are found in this case as in Rumery's. There is a special exception in this case to the finding (called decision), that after Babcock's agency commenced, he purchased the barley for the defendants.

I do not understand the referee to find that Babcock ever purchased this barley on his own account, but simply that he received it in store, the price being fixed at 55 cents.

The evidence upon the point raised is very meagre. Babcock says, as a witness, in effect that he purchased the barley of Bratt at 55 cents, prior to October 16. He is speaking of his purchases of all the respective plaintiffs made for the defendants, and of his doing a commission business.

It appears from Babcock's book that the Bratt barley was delivered on or prior to September 27, and from this it is claimed that Babcock had purchased it prior to that

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time. This does not follow. It is entirely consistent with the finding that it was sold and delivered at Babcock's warehouse, and that all of it was left at the warehouse and delivered, prior to any agency, and that after the agency Babcock purchased it for the defendants. The evidence upon the precise point whether this barley was the property of Babcock before the commencement of the agency, or remained the property of Bratt in the warehouse, is not very satisfactory. But there was evidence tending to show that Babcock purchased it as he purchased of others, for the defendants, and in my opinion we cannot disturb the finding. These judgments in favor of Rumery, Stebbins, Bratt and Barton, respectively, should be affirmed.

Judgments affirmed.

SUPREME COURT.

ENOCH ESCHBAUGH, appellant agt. THE SYRACUSE DISTILLING, MALTING AND BREWING COMPANY, respondents.

A judgment entered on a report of a referee, will not on appeal, upon a question of evidence merely be reversed, although from the evidence in the case, the referee might well have found the other way.

In this case, the general facts were found as in *Rumery's case* (ante p. 111), and especially that no part of the plaintiff's barley was delivered, and no part of the money paid, until after the day that the agency of defendants' agent had ceased.

Erie General Term. May, 1864.

Before DAVIS, P. J., GROVER, DANIELS and MARVIN, Justices.

APPEAL from judgment entered on report of referee. The facts sufficiently appear in the opinion. For a discussion of legal principles relating to defendants' liability, see *Rumery agt. The Syracuse Distilling, Malting and Brewing Company, ante, p. 111.*

Eschbaugh agt. The Syracuse Distillery Company.

GEO. W. COTHRAN, *for plaintiff.*

I. The referee erred in finding "that the plaintiff sold and delivered to Babcock 201 bushels of barley at 60 cents a bushel, and received in payment \$65—but that no part of said barley was delivered, and no part of said money paid until after the 16th day of October, 1860, but that the same was delivered during said month of October."

1. Because the finding is contrary to the evidence. The referee having found that Babcock was defendants' agent, with authority to bind them by his contracts for barley, made between the 2d and 16th of October, it is only necessary to ascertain when the contract or the delivery was made in this case. Upon the point of delivery there is no room for doubt; it is proven clearly and explicitly. Babcock testifies, "I made arrangements with Eschbaugh for his barley at 60 cents a bushel; when it was first delivered it was put into my barn—the warehouse being full; it was put into the barn before I went to Syracuse, October 16; I don't recollect that any of his barley was brought after I came back from Syracuse; I think no part of the barley of these plaintiffs was brought after I came back from Syracuse, nor did I contract with any of them after I came back from Syracuse; I am sure of this; I was present when his barley was weighed; he delivered 201 3-48 bushels; have paid him \$40." At the bottom of same page he says, "his barley was not weighed when it was first delivered, but I put it into my barn." And at folio 90, "when the barley was weighed it was entered in my books of the day when it was weighed." His books show the date of weighing in to have been October 27. The evidence of Van Rensselaer Gage fully corroborates Babcock. He testifies that plaintiff's barley stood in bags a fortnight before it was weighed. This fixes the time of delivery prior to the 16th of October. Not only that, but he says the bargain was alluded to as having been previously made.

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“Eschbaugh asked Babcock if he was going to take the barley on the contract he had made with him? and Babcock said to be sure, he would do with every man as he agreed, but that he couldn't take it into the warehouse that day; said they hadn't sent up boat for barley, and hadn't sent any money,” and that it was therefore put into his barn.

This evidence is undisputed and uncontradicted in any respect, and it is in fact, about all the evidence in the case upon that point.

2. To avoid the irresistible force of this evidence, the referee must have held, that admitting this evidence to be true, it did not establish a delivery in law. In this, his finding is equally erroneous. The evidence shows that the price—60 cents a bushel—was agreed upon and that the whole of plaintiff's barley was drawn to Babcock's warehouse; that he accepted of it, and put it into his barn; he did not weigh it then because his warehouse was full. The actual possession of the barley was taken by Babcock, and it being the intention of the parties that it should, the title to it passed to Babcock with the possession. (*Crofoot agt. Bennett*, 2 *N. Y. R.* 258;) *Shindler agt. Houston*, 1 *N. Y. R.* 261; *Gray agt. Davis*, 10 *N. Y. R.* 285; *Wooster agt. Sherwood*, 25 *N. Y. R.* 278, 520; *Allen agt. Cowan*, 23 *N. Y. R.* 502; *Waldron agt. Romaine*, 22 *N. Y. R.* 368; *Kimberly agt. Patchin*, 19 *N. Y. R.* 330.)

3. There is a class of cases holding that where any thing remains to be done by the vendor before making delivery, the title does not pass. The law on that point is definitely settled in this state to have reference to identity, and not to mere weight or measure. (*Lalor's Sup. Hill and Denio's R.* 418; *Crofoot agt. Bennett*, 2 *N. Y. R.* 258; *Terry agt. Wheeler*, 25 *N. Y. R.* 520.) But there remained nothing to be done by the plaintiff in this case; he actually delivered all of his barley, which was accepted by the defendants' agent. The weighing was for the defendants to do, to

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ascertain how much money they were to pay for plaintiff's barley.

II. The referee erred in his conclusion of law, that the defendants were entitled to recover in this action their costs and disbursements.

The referee having found that the defendants were liable to the farmers for all barley purchased by Babcock, and which had actually been delivered to him prior to October 16th, and having shown in my first point that he erred in finding that plaintiff did not deliver his barley before that time, it follows that his conclusion of law is erroneous.

III. All of the other findings of fact and conclusions of law are correct, as is shown in my points in Rumery's case.

IV. The judgment must be reversed, and the order of reference vacated, as it is a proper case to be tried by a jury.

PRATT & MITCHELL, for defendants.

By the court, MARVIN, J. In this case the general facts were found as in Rumery's case, and specially that no part of the plaintiff's barley was delivered, and no part of the money was paid until after the 16th of October, when, as he also found, the agency of Babcock ceased. He therefore found as a conclusion of law, that the defendants were not liable, and the plaintiff appealed, and makes the point that this finding of fact was against evidence.

I have examined the evidence carefully, and although I think the referee might well have found the other way, I do not think the judgment should be reversed. Babcock, as a witness, stated in effect, that he made the arrangement with plaintiff for his barley, and that it was received and put into his barn, the warehouse being full, prior to October 16th, and that it was not weighed when it was first delivered.

It appeared from Babcock's book that the plaintiff's bar-

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ley was received October 17, or rather this is the date under which it is entered with some 18 other persons. Babcock stated that the barley that appeared upon his books under the date October 27, was delivered as early as October 16; that when the barley was weighed in it was entered of the day when it was weighed; that he had at a time in bags some 1500 bushels.

Gage, a witness, confirms Babcock as to putting the barley into the barn and leaving it there in bags over a week, pretty near a fortnight, when it was taken to the warehouse and weighed.

This witness gave evidence tending to prove the purchase, but he was unable to fix the times. He says, it was late in the fall when it was taken into the barn. As to the bargain he says, when the first load was taken, plaintiff asked Babcock if he was going to take the barley on the contract he had made with him, and Babcock said, to be sure, he would do with every man as he agreed, but that he could not take it into the warehouse that day. Why did the plaintiff ask Babcock if he was going to take the barley on the contract he had made with him? and why did Babcock answer, to be sure he would do with every man as he agreed? The evidence shows that the price of barley declined to 50 cents within a few days after the 16th of October. It was an important question litigated on the trial, whether Babcock's agency ceased October 16th. He claimed that it continued. Now, if in truth, the plaintiff did not deliver his barley until after the decline, there would be a good reason for his asking the question whether Babcock intended to take his barley on the contract previously made, and no reason whatever appears why he should ask this question prior to a decline in the price of barley.

Babcock says, it was put in the barn before he went to Syracuse, October 16; that he does not recollect that any of it was brought after he came back. Now he states no

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circumstance more definitely to fix the time. He says he made no contracts after he returned from Syracuse.

If, in fact, the barley was not delivered at the barn until after the decline in price, which may have been as early as the 18th or 20th October, this would give a week or more for it to remain in the barn, and then he weighed it into the warehouse on the 27th October, the day claimed by counsel on the argument.

This theory corresponds more nearly with Gage's evidence that it was late in the fall. As to the time it stood in bags, he states no circumstance as an aid to his memory, "over a week," and further on in his evidence "pretty near a fortnight." I think the evidence justified the referee in finding that no part of the barley was delivered prior to October 16th, and that we cannot consistently with well settled principles disturb this finding, and the judgment must be affirmed.

Judgment affirmed.

SUPREME COURT.

SAMUEL DRURY agt. ROBERT P. RUSSELL.

In this case, the service of motion papers by the defendant's attorney to set aside an attachment and an order for publication, made upon the plaintiff's attorney some four years after the entry of judgment in the action, was held sufficient.

First District General Term, March, 1864.

THIS was a motion on the part of the defendant and his attorney, to set aside an attachment and an order for publication. The affidavits and other papers show that E. A. Doolittle, Esq., is the only attorney for the plaintiff in this action, and that when the attachment was issued and pretended to be served, and also when the order for publication was granted, he kept an office in the city of New York,

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and has done so ever since; that C. B. Wheeler, Esq., is the only attorney for the defendant in this action; that the defendant was then, and still is, a resident of the state of Virginia; that the order for publication was granted February 24, 1854, and the attachment issued February 27, 1854, and immediately thereafter it was pretended to be levied upon a promissory note, then in the hands of said Wheeler, and in his possession, and upon which a suit was then pending in the marine court (*see 3 E. D. Smith's R.* 419); that an answer was put in, the cause referred to the late Jonathan Miller Esq., who reported \$76.26 due the plaintiff; that this suit was commenced by the attorney Doolittle, for the express purpose of taking the note out of the hands of said Wheeler, and preventing him from recovering a judgment thereon; that judgment in this action for \$219.42 was entered up July 12, 1855, an appeal to the general term on a question of costs, was argued in February, 1856, by Mr. Doolittle, and January 13, 1859, an execution upon the judgment was also issued by Mr. Doolittle, and the judgment has not been paid; that the papers on this motion for April term, 1863, were served upon said Doolittle March 28, 1863, who appeared before Judge BARNARD, and raised a preliminary objection, that the papers should have been served upon the plaintiff personally. Whereupon the following order was made:

"At a special term of the supreme court, held at the city hall, in the city of New York, on the 7th day of April, 1863.

"Present—HON. GEORGE G. BARNARD, Justice.

"*Samuel Drury agt. Robert P. Russell.* The motion in this cause on the part of the defendant, to set aside the attachment and order for publication of the summons, coming on to be heard, after hearing C. B. Wheeler, Esq., counsel for the defendant, and hearing objections from E. A. Doolittle, Esq., the attorney for the plaintiff, that the papers had not been served upon the plaintiff personally,

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and that he, said Doolittle, had no right to appear for the plaintiff, and did not so appear, it is ordered that the motions be dismissed, but with liberty to the defendant and his attorney to renew the motions at any future time."

The affidavits further show that after this decision, a diligent, careful and faithful search and inquiry was made to find the plaintiff, with the view of serving him personally, but without effect; and the attorney for the defendant was informed that the plaintiff left the state over a year previous for parts unknown, and had probably gone to California; that the attachment and judgment roll in this action were brought into the superior court by said Doolittle, and used by him in June, 1856, in December, 1862, and again in January, 1863; that the papers on this motion served March 28, 1863, were kept and retained by said Doolittle.

The motions came on again before his honor Justice MULLIN, June 2, 1863, when the same preliminary objection was raised, and when the following decision was rendered, upon which an order was drawn and entered by Mr. Doolittle:

"*Drury agt. Russell.* The preliminary objection as to the service of the papers for the motion upon the attorney for the plaintiff, after some four years from the entry of judgment, is sustained, and the motion therefore denied, but without costs. J. MULLIN."

An effort was then made by the attorney for the defendant to procure an *ex parte* order, granting liberty to serve the motion papers by posting them up in the clerk's office. An order to show cause was granted, but the order asked for was finally refused.

An appeal was then taken from the aforesaid order made at the June term, which was argued February 16, 1864, before Justices LEONARD, PECKHAM and CLERKE, and on the 14th of March, 1864, the following decision was rendered, upon which an order has been entered:

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"Within the principles declared in *Lusk agt. Hastings* (1 *Hill*, 660), I think the service upon the attorney for the plaintiff in this case sufficient. The order appealed from should be reversed with ten dollars costs, and the motion be heard and decided by the special term upon its merits.

"R. W. P.

"I concur.

T. W. C."

SUPREME COURT.

SALLS, administrator, &c. agt. BUTLER and others.

The extension of the time to file and serve exceptions, or to serve a case with exceptions; does not also extend the time to serve a notice of appeal. Nor does the extension of the time to appeal *per se*, extend the time to file and serve exceptions, or to serve a case with exceptions. (*This is adverse to Sherman agt. Wells*, 14 *Hew.* 522, and *Jackson agt. Pasutti*, 23 *Barb.* 645.)

The court has no power to extend the time to appeal from the special to the general term, after the statute time to appeal has expired. (*The several reported cases on each side of this question examined.*)

St. Lawrence General Term, October, 1863.

POTTER, BOCKES and JAMES, Justices.

THIS is an appeal from an order granted at special term denying a stay of proceedings on the judgment, and also denying the application for liberty to bring an appeal from the judgment entered on the report of a referee.

The roll was filed and judgment was entered on the 26th day of September, 1862. Notice thereof was given to the defendant's attorney on the 9th October next following. The notice of appeal was served on the 6th December, which was immediately returned, under an objection that the time to take an appeal had expired.

HENRY L. KNOWLES, *for appellant.*

DART & TAPPAN, *for respondent.*

By the court, BOCKES, J. It is first urged that the time

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to appeal was extended to and including the 7th December, by stipulation. The stipulation made October 8th, 1862, extended the time to file and serve exceptions, and to serve a case with exceptions, sixty days from that time. It does not in terms extend the time to appeal. A party has ten days within which to file and serve exceptions, and also to make and serve a case with exceptions, and he has thirty days after notice of the entry of judgment, within which to take an appeal.

The extension of the time to file and serve exceptions, or to serve a case with exceptions, does not also extend the time to serve a notice of appeal. They are separate and distinct proceedings, standing on different periods of limitation, and serving different purposes. The notice of appeal takes the place of the writ of error under the old practice. The Code abolishes writs of error in civil cases, and declares that "the only mode of reviewing a judgment or order in a civil action shall be that prescribed by this title" (*section 323*), and then substitutes a notice of appeal in the place of the former writ, which in cases like this must be served within thirty days after written notice of the judgment (*section 332*).

In theory, the case and exceptions are settled and become part of the record before appeal, and this is very well too, for the party is not supposed to have determined on his appeal until he can see what his case is, as settled by the referee, or by the judge, in case the trial is had before the court.

The service of exceptions, or of a case with exceptions, is obviously no compliance, nor can it be fairly deemed to be an attempted compliance with *section 327*, which provides that an appeal must be made by the service of a notice in writing, stating whether the appeal is from the whole or only a part of the judgment or order. This notice and its contents, and the time within which it may be served, are provided for by *sections 327 and 332*. The

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practice as to the filing and serving exceptions, and as to the settlement of a case with exceptions, is established by another section (268), and by the rules of court (*Rule 34*). The extension of the time to appeal would not *per se* extend the time to file and serve exceptions, or to serve a case with exceptions, nor *vice versa*.

I cannot subscribe to the doctrine of the case of *Sherman agt. Wells* (14 *How.* 522), followed in *Jackson agt. Fassitt* (33 *Barb.* 645), in which it is stated that "the serving of exceptions or a case, is notice in writing that the party doing so intends to appeal." Such service does not of necessity disclose that intention. Notwithstanding such service, it is at the option of the party whether he will appeal. It is not therefore an appeal, for if it binds one party it should also bind the other. Besides, the proceeding by which an appeal is taken to the general term is expressly declared by law. It can be taken in no other way than that pointed out by section 327, which, as has been above stated, declares that it must be made by the service of a notice in writing, which must state whether the appeal is from the judgment or order, or from some specified part thereof. In my judgment the stipulation given before the time limited for the appeal had commenced to run, extending the time to file and serve exceptions, and also to serve a case with exceptions, did not also extend the time to appeal. Certainly it did not in express terms, nor in my judgment did it by implication.

The court at special term denied to the party leave to serve notice of appeal after the expiration of the time limited for that purpose, on the ground that such time being fixed by statute, the court had no power to extend it.

Notwithstanding there has been some diversity of opinion on this subject, I understand that the recent decisions fully sustain the ruling of the learned judge in this case at special term.

In 1849, Mr. Justice PARKER intimated an opinion that

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an enlargement of the time to appeal was within the discretionary power of the court, according to the then provisions of the Code (*Traver* agt. *Silvernail*, 2 *Code Rep.* 96). This was followed by a direct special term decision to the same effect in 1850. (*Crittenden* agt. *Adams*, 5 *How.* 310; see also *Seeley* agt. *Prichard*, 3 *Den.* 669.) In 1857, Mr. Justice MARVIN held the same rule (*Haase* agt. *The N. Y. C. R. R. Co.* 14 *How.* 430), as did Mr. Justice HARRIS in *Toll* agt. *Thomas* (18 *How.* 324).

In the following cases it was held that the court had no power to extend the time within which an appeal might be taken. (*Enos* agt. *Thomas*, 5 *How.* 361; *Renouil* agt. *Harris*, 2 *Sand.* 641; *Rewell* agt. *McCormick*, 5 *How.* 337; *The People* agt. *Eldridge*, 7 *How.* 108; *Sherman* agt. *Wells*, 14 *How.* 522; *Frey* agt. *Bennett*, 16 *How.* 385; *Humphrey* agt. *Chamberlain*, 1 *Kernan*, 274; *Galt* agt. *Finch*, 24 *How.* 193; *Ellsworth* agt. *Fulton*, 24 *How.* 20; see also *Wait* agt. *Van Allen*, 22 *N. Y.* 319.)

Thus it will be seen that the preponderance of authority is to the effect that the time to appeal cannot be extended by the court. After so much has been written on this subject, it seems unprofitable to attempt its further discussion. For myself, after a careful examination of all the cases, I can entertain no doubt that it was intended to restrict by law, appeals by an arbitrary and inflexible rule of limitation.

I am satisfied with the remark made by Judge DENIO in *Humphrey* agt. *Chamberlain*, that the Code prescribes the time within which an appeal may be taken from the special to the general term, and it is not in the power of the court to extend that period, or to allow an appeal when the time has been suffered to expire. Nor is it at all compatible with my view of the law to effect its evasion by setting aside a judgment for the purpose merely of giving a party a right of appeal, which he would not have except by such favor. The order appealed from should be affirmed, with ten dollars costs and disbursements.

Iselin agt. Dalrymple.

NEW YORK SUPERIOR COURT.

ADRIAN ISELIN, ERNEST GIRAUD AND HENRY J. BAILEY,
appellants agt. SILAS DALRYMPLE AND WILLIAM HABIR-
SHAW, respondents.

A provision in an assignment for the benefit of creditors, giving to an assignee, who is a lawyer, directions that "the assignee shall first pay and disburse all the just and reasonable expenses, attorney's fees, costs, charges and commissions of making, executing and carrying into effect the assignment," does not authorize any other or different compensation than such as is legal and just.

That is, the provision for the payment of "attorney's fees," although the assignee is an attorney and counsellor at law, does not invalidate the assignment.

(As an original question, it would seem to be very difficult to distinguish this case in principle from *Nichols agt. McEwen*, 17 N. Y. R. 23, where the assignment was pronounced void by reason of providing payment to an assignee, who was a lawyer, "a reasonable counsel fee."—Rmp.)

New York General Term, March, 1864.

Before ROBERTSON and GARVIN, Justices.

APPEAL by plaintiffs from judgment of special term.

WILLIAM WATSON, *for appellants.*

I. An assignment for the benefit of creditors, to an attorney and counsellor at law, which gives directions that "the assignee shall first pay and disburse all the just and reasonable expenses, attorney's fees, charges and commissions of making, executing and carrying into effect the assignment," is absolutely void. (*Nichols agt. McEwen*, 17 N. Y. R. 23; *same case*, 21 Barb. 65; *Barney agt. Griffin*, 2 Comst. 365; *Mead agt. Phillips*, 1 Sand. Ch. R. 83.)

(a) This case differs from that of *Nichols agt. McEwen*, only in the substitution of the words "attorney's fees," for those of "a reasonable counsel fee."

The clause in *Nichols agt. McEwen*, is as follows: "To convert the assigned property into cash, by sale and the collection of debts, and by and with the proceeds of such sale and collections, to pay and disburse all the just and

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reasonable expenses, costs, charges and commissions of executing and carrying to effect the assignment, together with a reasonable counsel fee" (17 *N. Y. R.* 22).

That in the case now before the court is, "shall also collect all and singular the said debts, dues, bills, notes and accounts, choses in action, claims and demands, or so much thereof as may prove collectable, and with and out of the proceeds of such sales and collections, the said party of the second part shall first pay and disburse all the just and reasonable expenses, attorney's fees, costs, charges, and commissions of making, executing and carrying into effect this assignment and the trusts thereby created, and with and out of the residue or net proceeds, pay the debts in the manner following."

II. The learned justice erred in admitting evidence (against the plaintiffs' exception) for the purpose of showing that the assignee did not avail himself of the powers conferred by the assignment. In determining the validity of an instrument, the question is, what powers does it confer, and not whether the grantee has availed himself of the powers. (*Barney agt. Griffen*, 2 *Comst.* 265; 1 *Sand. Ch. R.* 83; 4 *Paige*, 23; 11 *Wend.* 187.)

In these cases the court held, it is no answer to the argument that the power is contingent, and that no occasion has arisen for its operation. The question is, what does it enable the debtor to accomplish?

(a) The property assigned consists entirely of choses in action. The assignment gave power to the attorney, a lawyer, to exhaust the entire fund in defending the assignment, or bringing suits under it, before a single creditor could be paid, and out of the residue to pay creditors with preferences. Such a provision is against public policy. (21 *Barb.* 65; 17 *N. Y. p.* 20, *approving the reasoning.*)

(b) The vice of the instrument is, that it empowers the assignee to receive more than the law permits. All the reasoning of the court in the case of *Nichols agt. McEwen*.

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is equally applicable to this. As in that case, the court, *DENIO*, J. p. 271, held that the assignee would have had a right to claim a counsel fee as a lawyer. So in this, he can claim as a lawyer, attorney's fees. The court in this case held that the commissions and counsel fees are linked together, and the latter intended as an augmentation of the former. In both cases the assignee was empowered to pay and disburse. The ground of the decision is, that it empowered the assignee to pay himself more than the law allows. The law allows him commissions alone.

III. The case of *Van Ness* agt. *Yoe* (1 *Sand. Ch. R.*), cited by the learned justice in his opinion, has been overruled by the court of appeals, in the case of *Dunham* agt. *Waterman* (17 *N. Y. R.* 19), and it is held that an assignment which gives expressly to the assignee powers which he might have exercised without a grant, may, nevertheless, be void for the reason that if the assignee errs in the exercise of his legal powers, the court may control him. But if he errs in the exercise of those that are expressly granted by an individual, the court has no power to substitute its discretion for that conferred upon the assignee.

The court also held in this case (17 *N. Y. R.* pp. 20, 21), that "although the fraud must be passed upon as a question of fact, it becomes the duty of the court to set aside the finding, if in opposition to the plain inference to be drawn from the face of the instrument."

IV. The assignment is one giving preferences. The learned justice found that it was general, and it is so alleged in the answer. But the assignment itself shows that it contains the most objectionable preference in providing that all costs, expenses, attorney's fees of executing and carrying into effect the assignment, be first paid, and out of the residue, certain preferred creditors specified in schedule A, and out of the residue the creditors generally.

V. The judgment should be reversed for the error of

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admitting the assignee to testify that he did not act as attorney, as well as for the final decision.

C. LAWTON, *for respondents.*

The complaint states no cause of action against the defendant Dalrymple, except that he is an attorney and counsellor at law, and that "a preference in payment out of the assigned property is given to all the expenses, attorney's fees, costs, charges, and commissions of making and carrying into effect the said assignment, and the trust thereby created," and avers that this clause makes the assignment fraudulent and void, which we deny.

- And this presents the only point in the case, which is a question of fact. (*Scott agt. Guthrie*, 25 *How. Pr. R.* 481, 512; 2 *R. S.* 137, § 4.)

1. It does not appear upon the face of the assignment that Mr. Dalrymple is an attorney or counsellor at law. The statute makes no distinction between professional and unprofessional assignees (*Nichols agt. McEwen*, 17 *N. Y. R.* 22).

2. Assignees are entitled to commissions and expenses, the same as executors and administrators (*Barney agt. Griffin*, 2 *Comst.* 365).

3. And executors and administrators are always allowed, on accounting, all reasonable expenses, attorney's and even counsel fees paid by them in the execution of their trust. (*Hosack agt. Rogers*, 9 *Paige*, 461; *Collins agt. Hosere*, *id.* 87; *Elliott agt. Lewis*, 3 *Edwards' Ch. R.* 40.)

4. The charges specified, are, and always have been allowed to executors and administrators and assignees by law, and it is absurd to say that an assignee is legally entitled to be allowed charges which if mentioned in the assignment would render it void. In *Nichols agt. McEwen*, the sole reason for declaring the assignment void was, that it gave the assignee an indefinite counsel fee beyond his com-

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missions, which could not at that time be reached in any other way, as he would account only under the assignment, and by its authority take any amount he chose, and without regard to any services rendered or to be rendered.

5. But all this is changed by the law of 1860, under which this assignment was made. An assignment is to be recorded, and the assignee is to account to a court having full authority to determine the amount and reasonableness of all fees, charges and expenses that the assignee may make whether in the assignment or not (*Session Laws 1860, 594*).

6. The assignment in this case is taken from *Burrill on Assignments* (an acknowledged authority), and is in the usual form.

7. The words expenses, attorney's fees, costs and charges, all mean the same thing—that is, money necessarily paid to attorneys, auctioneers, clerks, carmen, &c.; these are only the ordinary disbursements to others in the course of business, which have always been allowed to executors and administrators, and assignees, and nobody ever before thought that they either did or were intended to effect or increase the compensation of the assignee, or in any manner invalidate the assignment. (*Hulsted agt. Gordon, 34 Barb. R. 422; Campbell agt. Woodworth, 24 N. Y. R. 304.*)

8. Formerly all those charges were almost absolutely in the discretion of the assignee, but under the law of 1860 they are all brought under the supervision and control of the court, and the reason for the decision in *Nichols agt. McEwen*, no longer exists. The decision in that case is excused by *DENIO*, on the ground of necessity, which necessity no longer exists. Besides, that case gives to the assignee a counsel fee; this only provides for necessary disbursements. And it does not appear that the items of expenses, attorney's fees, costs and charges, will ever accrue, or that one cent will ever be paid or taken for either. There is no authority or provision to pay them unless they are incurred, and are reasonable and legal, and

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no intent to take them or pay them illegally can be inferred from the assignment (*Kellogg agt. Slawson*, 11 N. Y. R. 303).

9. The estate assigned consisted only of notes and accounts; there was no goods, chattels, or merchandize of any description, and in such a case it was eminently proper that a person who was familiar with making collections should be selected as assignee. The selection in this case was judicious, legal, and every way commendable, and within the opinion of Mr. Justice ROOSEVELT in *Nichols agt. McEwen*.

10. The assignment is legal and valid on its face, and upon the proofs and the judgment in this action, should be affirmed with costs.

By the court, GARVIN J. The particular objection urged against this assignment is the preference given to the "attorney's fees," by the terms of the assignment itself; and it is claimed that this provision renders the assignment absolutely void. As to the matters of fact, the justice who heard this case at special term, has found that the said assignee was not the attorney or counsel for the assignor before executing the assignment, or in relation to drawing the same, and did not draw the same, and has not since the execution of said assignment acted as attorney or counsel in collecting of claims due said Habirshaw, and so assigned, and that there are no fees due to him, or claims by him, for making and executing the assignment; that no compensation to the said assignee is provided for in said assignment beyond charges and commissions allowed him by law, and that such assignment was not made to hinder, delay or defraud the plaintiffs, or any other of the creditors of the defendant, William Habirshaw.

Upon all these questions of fact, the finding of the justice is conclusive. The insertion of a clause in an assignment providing for the payment of "all reasonable charges

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and commissions attending the execution thereof," has been held not to invalidate the assignment (34 *Barb. Rep.* 422). So it has been held that a provision in an assignment for the benefit of creditors (giving preferences), that the assignees shall first be paid all expenses necessarily incurred in the execution of the trust, including the charges of drawing the assignment, together with a just and reasonable compensation for the labor, time, services and attention of the assignees about the trust, does not avoid the assignment.

And that what is just and reasonable will be determined by the court on an accounting (33 *Barb. Rep.* 425).

It is further held in *Campbell et al. agt. Woodworth et al.* (24 *N. Y. R.* 304), that the insertion of the clause giving to assignees (one of them being a lawyer) "a just and reasonable compensation for labor, time, services and attention" in the business of the trust, means no more than a provision for the commissions fixed by law. There can be no doubt that an assignee has the power, independent of any provision in the assignment, to enforce and defend rights connected with and growing out of the trust, and to pay the expenses of so doing; conferring this power in terms in the assignment upon the assignee, does not render the instrument itself void.

The compensation allowed an assignee for labor, time, services, and such expenses as are necessarily incurred in the execution of the trust, this compensation is called a commission or commissions, and it has been frequently "adjudged that such rate of compensation is just and reasonable in all cases."

This is all the assignee can receive, however onerous his duties, and he is entitled to the same rate of compensation though his duties may be ever so light.

The court of appeals says, in regard to the case of *Nichols agt. McEwen* (17 *N. Y. R.* 22), "this court pronounced an assignment void which contained a provision providing

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for compensating an assignee, who was a lawyer, for all his expenses, costs, charges and commissions, together with a reasonable counsel fee. It was only the provision for the counsel fee which received the condemnation of this court, and the allowance to the assignee for all his expenses, costs, charges and commissions, was deemed unobjectionable" (*Campbell agt. Woodworth*, 24 N. Y. R. 306).

The case of *Campbell agt. Woodworth*, settles the question that the words "expenses, costs, charges and commissions," are unobjectionable in an assignment. "Attorney's fees," added thereto, would not in the light of this case be objectionable, because the words "a just and reasonable compensation for time, labor, services and attention," are unobjectionable, certainly costs and charges, time, labor and services cover all that is or can be included in "attorney's fees," so that whether these words are in or out of the assignment, it can make no difference.

Again: this assignment only authorizes the assignee to pay and disburse all just and reasonable expenses, &c. It therefore is not apparent on the face of the assignment that the assignee was to have any compensation beyond such as he is legally entitled to, for no provision is in terms made for him. In 34 *Barb. Rep.* 422, the clause allowing the assignee "all reasonable charges and commissions," attending the execution of the trust, was construed as referring to the compensation of other persons lawfully employed by the assignee. The words in this case rather exclude the idea of compensation to the assignee.

The language used in this assignment does not authorize any other or different compensation than such as is legal and just.

The judgment in this case should be affirmed, with costs.

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SUPREME COURT.

OSCAR S. OAKES AND OTHERS, EXECUTORS &c., appellants
agt. WILLIAM HOWELL, respondent.

An action to reform a contract or instrument in writing for the sale of lands, on the ground of *mistake, accident or inadvertence*, is barred by the *ten years statute of limitations* from the time the *cause of action accrued*; and not, as in cases of *fraud*, where the statute runs *six years* from the time the *fraud is discovered*. Before the code, the statute of limitations applicable to the grounds of fraud, were equally applicable to those of mistakes and accidents.

Fifth District General term, March, 1864.

ALLEN, MULLIN, BACON and MORGAN, Justices.

THIS action was brought by the testator and tried in his life time, and the present plaintiffs, his executors, have since been substituted under the statute.

The suit was commenced April 11, 1861, and was for the reformation of a sealed agreement entered into between the testator and the defendant, September 22, 1849, for the sale of lands by the testator to the defendant, for \$2,000, payable by installments, the last of which was payable on the first of March, 1861.

The installments were paid by the defendant as they became due, but the claim of the plaintiffs is, that by the terms of the contract, as actually made, the defendant was to have paid annual interest on the amount not paid at the time of each payment, but that the provision for the payment of interest was omitted in the written agreement by "inadvertence, mistake or over-sight." The charge in the complaint is, that neither of the parties knew of the omission and mistake until after the commencement of the annual payments, which was March 1, 1854; the contract as written providing for payment of interest up to that time.

The plaintiffs were nonsuited upon the trial at the Jefferson county special term, by MULLIN, J., upon the ground

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that the cause of action was barred by the statute of limitations; from this judgment there is an appeal.

J. F. STARBUCK, *for appellants.*

LEVI H. BROWN, *for respondent.*

I. The alleged omission and mistake occurred, if ever, when the contract was executed and delivered, September 22, 1849, and the right of action, if any, arose instantler, and the plaintiff could then have commenced the action for relief.

The statute of limitations begins to run when the right of action first arises. (*Story's Eq. Jur.* § 1521, *a*; *McKenna agt. Gardner*, 3 *J. R.* 137; *Leonard agt. Pitney*, 5 *Wend.* 30; *Argall agt. Bryant*, 1 *Sand. S. C.* 98; *Schrappel agt. Corning*, 2 *Seld.* 107; *Bloodgood agt. Bruen*, 4 *Seld.* 362; *Borst agt. Corey*, 15 *N. Y. Rep.* 505.)

Before the code such was held to be the general rule in equity, but in cases of fraud and mistake, it was held to begin to run from discovery of the fraud or mistake (*see* 2 *Story Eq. Jur.* § 1521, § 1521 *a*, and *case cited in note*). Courts of equity then acted in obedience and analogy to the statute. (5 *Wend.* 30; 3 *Sand. S. C. R.* 463, 482-3.)

The reason why under the old rule it was held the statute began to run from the discovery, was that in truth and fact no right of action existed until the discovery, and until then plaintiff was guilty of no laches in enforcing his claim. The great variety of cases arising in the old equity courts, in which the statute was held not applicable as at law, will appear by reference to 1 *Paige*, 239; 10 *id.* 445; 11 *id.* 199; 8 *Cow.* 360; 2 *Barb. Ch. R.* 477; 3 *id.* 199; 2 *Denio*, 577; 5 *Barb.* 398; 14 *id.* 548; 2 *Seld.* 268; 3 *Sand.* 463, and other cases elsewhere cited.

II. By the present code, the court exercises both law and equity powers, under statute rules prescribed to govern its actions as to both, and many of the old equity rules

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have been incorporated into the statute, and where such appears clearly to have been done, the court must be governed by the statute. (5 *Wend.* 30; 15 *N. Y.* 505.)

Section 91 of the code provides "an action for relief on the ground of fraud shall be brought within six years," and declares the cause of action in such case not to be deemed to have occurred, until the discovery by the aggrieved party of the "facts constituting the fraud" (*Subdivision* 6). This section specifies fraud, and carefully excludes from its operations the other well known cases cognizable by courts of equity, such as relief from "accident, mistake," etc. The plaintiff does not allege or go upon the ground of fraud. The lapse of ten years was a bar. (3 *Barb. Ch. R.* 199, 203; 3 *Denio*, 577; 5 *Barb.* 399, 411.)

III. Plaintiff alleges that neither party ever knew or discovered the alleged mistake or omission; and also alleges defendant knew of it when the contract was executed and delivered, but failed to inform plaintiff thereof.

But suppose defendant did know of the omission, and did not declare it, then was there any fraud on his part? Could not plaintiff read as well as defendant? Had not plaintiff an equal opportunity and capacity to look out for himself? Was it defendant's duty to disclose it? Did defendant violate any confidence, make use of any device, trick or misrepresentation? Was plaintiff misled, deceived, or in any way influenced by any word, act, thought or deed of the defendant? Or, if the mistake occurred at all, was it not plaintiff's act, omission, fault and carelessness equally with the defendant's by which it was occasioned, and plaintiff failed to discover it? Defendant was not bound in this case to disclose anything, and his silence or omission to disclose would not exclude him from the operation and benefit of the statute. (5 *Wend.* 30; *Troup* agt. *Smith*, 20 *J. R.* 33; *Willard's Eq. J.* 151, 152, 167, 69, 71, 73, 54, and cases cited.)

IV. The case was decided, however, upon plaintiff's

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opening, alleging an omission by mistake only. The case therefore was properly dismissed, because based under section 97 of the code, which declares that "an action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall have occurred."

When the statute was enacted, the distinction recognized in equity courts between accidents, mistakes and frauds, was well understood, and the legislature intentionally declared the two rules (*section 91, sub. 6, and section 97*) to govern the two classes of cases—one of frauds, where the action is held to accrue on discovery of the fraud, and the other for mistakes, accidents, etc., where the right of action does not depend upon future discovery, but on the occurrence of the mistake or accident (*15 N. Y. R. 505, and other cases above cited.*)

V. To authorize a reformation of the contract it must appear there was a mutual mistake of both parties. The omission must have been known to both, and reformation could not be granted because one alleges he did not understand the contract as written, and the other party did (*Story, § 142, 155*). And the mistake must be as to the terms of the contract made, and not as to its legal effect. (*Story, §§ 111, 113, 114, 115; Willard's Eq. J. page 59 to 68; 9 Barb. 532; 10 id. 9.*)

The judgment of nonsuit should therefore be affirmed.

By the court, ALLEN, J. There is no allegation of fraud in the execution of the contract, that the plaintiffs' testator was prevented from reading it, or that it was misread to him, or even that he did not read it, or that the defendant was instrumental in causing or procuring an agreement to be prepared or written different from the understanding and verbal agreement of the parties. Neither is it claimed that the alleged mistake and omission was concocted by the act or fraud of the defendant. Indeed, the allegation

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is that the defendant, as well as the testator, was ignorant of the mistake for several years after the making of the agreement. The action is not then for relief on the ground of fraud in respect to which the statute of limitations only runs from the discovery of the fraud (*Code*, § 91, *sub. 6*).

The case is within the ten year limitation prescribed by section 97 of the code, being for relief not specifically provided for elsewhere in the title limiting the time of commencing civil actions (*Code*, *title 2 part 2*). In this, as in every case, the statute commenced to run from the accruing of the cause of action. Even subdivision 6, of section 91, does not make the case of fraud an exception to this rule, but brings it within it, by declaring that the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. The plaintiffs' cause of action accrued immediately after the execution and delivery of the written agreement, on the 22d of September, 1849.

The plaintiffs' testator had the same right of action that he had at the time of the commencement of this action, as the right did not depend upon any act to be done thereafter by either party, and of course the statute of limitations barred the action after the 23d of September, 1859, nearly two years before it was commenced.

This is all that need be said. The statute is explicit and free from ambiguity, and its application to the case in hand is too palpable to admit of controversey. Except on the single ground of fraud, the existence of a cause of action does not depend upon the knowledge of the party in whose favor it occurs, and ignorance of one's rights will not take a case out of the operation of the statute, or prevent its running against a claim.

Courts of equity were not originally absolutely barred by the statute of limitations, but they adopted the statute as a rule of decision, and as a guide to their discretion.

But in cases of fraud, they held that the statute run

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from the discovery of the fraud, because the laches of the plaintiff commenced from that time, and in this, courts of law differed from courts of equity, the former being absolutely barred by the words of the statute. Mistake was also held by courts of equity within the same rule as fraud. (*Story Eq. Ju.* §§ 15, 21 a ; *Burk's Bank agt. Smith*, 2 *Young & Colyer*, 58 ; *Leonard agt. Pitney*, 5 *W. R.* 30 ; *Borst agt. Corey*, 15 *N. Y. R.* 505.) In every other case, both at law and equity, and in all cases at law, the statute of limitations commenced running from the time the cause of action accrued, whether its existence or the facts out of which it arose were known to the party entitled or not, and in actions for damages for fraud, or for a breach of an undertaking, the cause of action accrued at the time the fraud was perpetrated, or the undertaking broken, although no actual injury had then resulted. (*Argell agt. Bryant*, 1 *Sand. S. C. R.* 98 ; *McKenna agt. Gardner*, 3 *J. R.* 136 ; *Schræppel agt. Corning*, 2 *Seld.* 107 ; *Bloodgood agt. Bruen*, 4 *id.* 362.)

But law and equity jurisdiction are now conferred upon the same tribunal, and the distinction between legal and equitable rights and remedies, so far as the forms of action and procedure are concerned, are abolished, and the code has undertaken to, and has prescribed a limitation of time for the commencement of all actions, whether such as were of legal or equitable cognizance, and the court is as absolutely bound by the statute, when sitting as a court of equity, as when acting as a court of common law. The code has, in extending the statute of limitations to equitable actions, followed very nearly the rule which had been adopted and acted upon by the court of chancery. It gives to the party defrauded the same benefit which was extended to him by the courts of equity in actions to be relieved against the fraud, and protects him from the operation of the statute until he has knowledge of his right of action by a discovery of the fraud, and only holds him responsi-

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ble for actual laches. But this exception of the court of chancery does not embrace causes of action growing out of mistakes and accidents, equally well known and important heads of equity jurisdiction. And from the absolute obligation of the present statute upon the courts, and its clear application to every case that can arise, and to every form of action by every principle of statutory construction, the cases of mistake and accidents are excluded from the exceptions in favor of actions for relief from fraud. The intent is evident not to embrace the other cases within it.

The action was properly disposed of at the special term, and the judgment must be affirmed.

SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF HENRY BAGLEY.

Where a town clerk declares publicly his intention of removing from the town and county, and consults with the justices of the peace in the town as to the appointment by them of his successor, and does actually thereafter leave the town, and his successor is appointed, who qualifies, and takes possession of such books and papers belonging to the office as he can find, the latter will be considered duly appointed town clerk, and entitled, on application to the court, to have delivered to him the books and papers of the office, notwithstanding the former clerk swears on such application, that he was and still is a resident of the town, and expected to return there.

Hudson Special Term, November, 1863.

APPLICATION to compel Samuel W. Stimpson to deliver up the books and papers, belonging to the office of the town clerk of Windham, Greene county, to the applicant, Henry Bagley, who claims to hold the office of town clerk of said town, under and by virtue of an order made by the justices of said town, appointing him in the place of Luman S. Hunt, who, it was alleged, had removed from said town and county.

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D. K. OLNEY and J. B. OLNEY, *for application.*S. S. GIVENS and P. R. MATTOON, *contra.*

MILLER, J. The affidavits upon which the order to show cause in the above matter was granted, make out satisfactorily that Hunt had removed from the town and county, and that a vacancy existed which the justices were authorized to fill. There is no doubt of the fact that he did leave, and that prior to his departure he had some conversation with the justices of the town about supplying his place, which was of such a character as to induce them to take action on the subject, and to fill what they supposed and believed was a vacancy in the office. Although Hunt swears that he was and still is a resident of the town of Windham, and that he expected to return there, he does not specify when he means to come back, or that he intends to return and remain there permanently as a resident of said town. In swearing to his residence there at the present time, I think he may be regarded as testifying to a mere conclusion of law, and what would ordinarily be presumed, until he had by locating himself, acquired a residence elsewhere. He does not state where he has been since he left, where he is going, how long he is to be absent, or the particular nature of the business which has called him away; nor does he give any good and substantial reason why he should not explain the particular cause of his absence. Under the circumstances, I think this should have been done.

The allegation of the applicant that he had gone to New York, and was intending to go from there to Chicago, is not met in Hunt's affidavit, and must therefore be assumed to be true.

The same remark is applicable to the statement which he made upon the day of the last state election at the polls, and while depositing his ballot, that it was the last time he should vote in said town of Windham.

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With the facts presented by the papers of the applicant, I think that Hunt was bound to meet the allegations made with more precision and certainty, and to explain more satisfactorily his conduct and his declarations, so as to rebut the inference to be drawn from them, that he really intended to remove from the town and to vacate his office. It is quite certain that his own action, and his application to the justices to appoint a successor, which was entirely unnecessary if he had only intended to be temporarily absent, was the cause and occasion of the appointment of the applicant to fill his place, and that they relied upon his representations in appointing the successor. They acted in entire good faith, and had reason to believe, and it is manifest from their proceedings, did believe that the office was vacant. Hunt virtually conceded that such was the case, and has no good ground of complaint that he was taken at his word.

It is said that no warrant can issue to compel the delivery of books and papers, unless the applicant's title is clear. Concede the correctness of this position, and is not a plain case made out by the applicant? His predecessor had made distinct avowals that he intended to leave the town, upon the strength of which a new appointment was made. He had actually left, and the applicant, immediately upon receiving the appointment took the oath of office, took possession of such of the books and papers as he could find, and the key of the desk containing the remainder; demanded those in possession of Stimpson, and acted as town clerk at a meeting of the board of town auditors. As the case stands, I think there can be no reasonable doubt that the applicant's title is clear, and within the principle decided in similar adjudged cases. (*The People* agt. *Stevens*, 5 *Hill*, 610, 629; *Matter of Whiting*, 2 *Barb.* 513, 518.) More especially is such the case where the defendant has left and is not an officer *de facto*, and the applicant has possession, and has commenced discharging the duties of

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the office. But *prima facie* evidence of title is enough. (*Matter of Baker*, 11 How. P. R. 418; *Matter of Carpenter*, 7 Barb. 57; *Conover* agt. *Devlin*, 14 How. P. R. 550; *Devlin's Case*, 5 Abb. P. R. 307; see also cases above cited.)

The applicant was appointed the successor of Hunt by the solemn and deliberate act of the officers of the town duly authorized for that purpose; he qualified, acquired possession of a portion of the books and papers and of the office itself, and has a right to invoke this proceeding. (*See Conover* agt. *Devlin*, 14 How. P. R. 550; *S. C.* 5 Abb. P. R. 73; *Devlin's Case*, *id.* 281.) Nor is it any reason for denying the application because it involves the validity of the appointment, and a resort may be had to an action to try the title (*Matter of Bartlett*, 19 How. P. R. 414). The remedies are concurrent, and as the applicant establishes a legal right to the books and papers remaining in possession of Stimpson, the relief claimed should be granted.

It is also argued that section 56 (1 R. S. 1st ed. 126), does not embrace a case like the present one, and that as it does not come within section 9, of 1 R. S., page 359, 1st edition, the Revised Statutes provide no remedy.

I think that section 56 is an independent provision, intended to apply to cases of third persons who might come into the possession of books and papers belonging to a public officer, and to cases not otherwise provided for. The language of the section is broad and comprehensive, embracing "any person appointed or elected to any office," and the office of town clerk is manifestly within its scope. This construction is essential to make a complete remedy in all cases, which was doubtless intended, and is entirely consistent with the other provisions of the Revised Statutes on the same subject.

For the reasons given, the application on behalf of Bagley must be granted.

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SUPREME COURT.

RICHARDSON agt. WHITE AND MAXWELL.

In an action of *trover* for the conversion of personal property, by an *assignee* of the claim, the plaintiff's proceedings will be *stayed on motion*, until payment of a prior judgment of non-suit *for costs*, obtained by the defendant against the plaintiff's assignor for the *same cause of action*.

The rule is the same in personal actions as in actions to recover real property.

Saratoga Special Term, May, 1864.

ACTION of *trover* for the conversion of personal property.

J. C. HULBURT, *for plaintiff*.

L. B. PIKE, *for defendants*.

BOCKES, J. The defendants move for an order requiring the plaintiff to file security for costs, and also to stay his proceedings until payment shall be made of the costs recovered on a judgment of non-suit in an action by Alice Marr (plaintiff's assignor), against them, brought for the same cause of action for which this suit is prosecuted.

The plaintiff cannot be required to give security for costs, as it is made to appear that he was at the time of the commencement of the suit, and still is a resident of this state. As regards this branch of the application, it must be denied.

It is made to appear that the cause of action in this suit is identical with that in the suit of Alice Marr against these defendants, wherein a non-suit was granted on the trial, and a judgment for costs entered; and it is also made to appear that such judgment for costs has not been paid; and further, that Alice Marr has no property from which the costs can be collected, and that she has left the country. This action is prosecuted by Mr. Richardson as purchaser and assignee of the claim from Alice Marr.

Had Alice Marr re-sued the defendants on the same

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demand, and for the same cause of action for which the former suit was prosecuted in which she was non-suited, proceedings would be stayed until the costs in the first suit were paid.

It was decided in *Cuyler agt. Vanderwick* (1 *John. Cases*, 247), that if a plaintiff voluntarily suffers a non-suit, and then brings a second action without paying the costs of the first the defendants may, at any time before trial, move for a stay of proceedings until the costs of the first suit are paid. This has been the universal practice. (1 *Cow.* 138; 3 *Cow.* 22; *id.* 57; *id.* 380; 19 *John.* 237; 9 *Wend.* 449; 6 *Hill*, 372; 5 *How.* 75; 2 *How.* 32; 22 *How.* 444; 15 *Abb.* 273.) The rule is the same in England. (4 *Eng. Com. Law*, 205; 62 *Eng. Com. Law*, 164; 4 *East* 585; 2 *Term R.* 511; 8 *Term R.* 645; 6 *Term R.* 223; 6 *Term R.* 740.) The motion to stay will not be granted when the non-suit or verdict was obtained by fraud or perjury, nor unless the second action is by the same party plaintiff, or by one claiming through or under him. (9 *Eng. Com. Law*, 272; 18 *Eng. Com. Law*, 555; 1 *Cow.* 140.) Nor in case the plaintiff is in execution for the costs of the former suit. (16 *Eng. Com. Law*, 334; 4 *Wend.* 203.) It will be seen by an examination of the cases cited, that a stay will in general be granted until the costs of the former suit are paid, when the cause of action in both suits are identical, and both actions are between the same parties or their privies. Nor is this rule of practice confined to real actions, but it is extended to personal and mixed actions as well. Several of the cases cited were assumpsit, one was slander, and one was assault and false imprisonment.

In this case the present plaintiff claims to recover on the same cause of action prosecuted in the former suit, having become purchaser and assignee thereof from the plaintiff in the first action. The authorities are conclusive that if the second suit had been by Alice Marr, proceedings would have been stayed until the costs of the first were paid.

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Can a purchaser from her of the demand obtain any better position than she occupied? Clearly not. He takes by his purchase her place, and stands in her shoes, as regards the claim and demand transferred to him. (22 *N. Y.* 535; 24 *How.* 44; 18 *Law & Eq.* 82.) As regards this demand he is in privity with her, holding her right and title, and can enforce it only to the extent that she could had no transfer been made, and had this suit been in her name. He holds the claim subject to all rights and equities existing at the time of the transfer against her, and in favor of the defendants. The right to have the proceedings stayed in a case like this, does not depend on the question whether the costs can be collected on execution, but it is exercised as an equitable power in order to prevent a vexatious multiplication of suits (3 *Cow.* 381).

It is urged that the motion should be denied, because the suit is prosecuted by the present plaintiff for his sole benefit; that Mrs. Marr has no interest whatever in it. But according to the authorities the plaintiff is in privity with Mrs. Marr, having obtained his title from her, and he can take by the assignment from her no better position or standing than she possessed. The plaintiff claims under her, on her right, and under her title. The same point was made in the case cited (8 *Term Rep.* 645), that the second action was not between the same parties named in the first. But the court granted the stay, inasmuch as it was made to appear that the plaintiff in the second suit claimed under the same title as did the plaintiff in the first action. So Lord KENYON said (6 *Term*, 740), the only question in these cases is, whether the second ejectment is in substance brought to try the same title; if so, the rule is of course to stay the proceedings until the costs of the former ejectment have been paid. True, the last two cases cited were ejectment, but as above stated, the rule is the same in personal actions. An order must be granted staying the plaintiff's proceedings until the costs of the former suit are paid.

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SUPREME COURT.

THE PEOPLE *ex rel.* PETER L. MULLER, agt. THE COMMISSIONERS OF HIGHWAYS OF THE TOWN OF SCHODACK.

In proceedings upon a *common law certiorari*, to review proceedings of commissioners of highways, the prevailing party is entitled to costs. (*This agrees with Haviland agt. White*, 7 How. P. R. 154; *People agt. Flake*, 14 id. 527; and *People agt. Robinson*, a third district general term decision, 1859, not reported; and is adverse to *People agt. Heath*, 20 How. P. R. 304.)

Albany General Term, September, 1863.

GOULD, HOGEBROOM and MILLER, Justices.

MOTION by the relator for costs upon a reversal of the proceedings of the commissioners for an alleged encroachment upon the highway by the relator.

On the 29th of September, 1860, an order was granted at special term, authorizing writs of certiorari to issue to the commissioners of highways of the town of Schodack, to N. N. Seaman, a justice of the peace, and to the town clerk of said town, to bring up the proceedings of the commissioners in reference to the encroachment alleged. On the 13th of December, 1860, a writ was issued returnable at special term in December, 1860, to which the commissioners made a return. On the 28th day of August, 1861, a second order was obtained, authorizing writs of certiorari to be issued to the justice, town clerk and constable. Writs were issued accordingly, to which returns were made. The case was argued at the general term of the supreme court in May, 1862, and the proceedings of the commissioners were vacated and reversed. The decision was silent as to costs, making no provision for them.

S. F. HIGGINS, *for relator.*

O. M. HUNGERFORD, *for commissioners.*

MILLER, J. The question whether a party is entitled to costs upon an order entered in proceedings upon a common

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law certiorari, similar to those presented upon this motion, has been frequently before the courts, and if it was an original question, I should be strongly inclined to the opinion that costs were not recoverable in such cases. As however the point raised has been a subject of discussion in the courts, and called forth repeated decisions, the solution of it must depend to a very great extent, if not entirely, upon the weight of authority.

In *Haviland agt. White, &c.* (7 How. P. R. 154), which was a common law certiorari to remove proceedings under the statute in relation to the "relief and support of indigent persons," it was held at general term, BARCULO, J., delivering the opinion, that it was a special proceeding under section 3 of the Code brought up for review, and within section 318 of the Code, the prevailing party was entitled to costs.

In *The People agt. Flake and others*, (14 How. 527), which arose upon a common law certiorari to remove the proceedings of referees, appointed on an appeal from the decision of commissioners of highways; the determination of the referees was set aside with costs; and upon an application to the court for direction as to costs, it was held at special term, that the proceeding before them was a special proceeding under section 3 of the Code, and that costs might be awarded under section 318 of the Code. The costs were ordered to be collected by tax from the town.

In *The People agt. Robinson*, decided at the general term in the third district, in March, 1859, but not reported, a common law certiorari was brought to remove the proceedings of referees on an appeal from the decision of the commissioners of highways, and the determination of the referees was reversed without any award as to costs. An order was entered awarding costs to the relator, and the costs were taxed. Upon an application to set aside the order awarding costs, GOULD, J., held that costs were recoverable. An appeal was taken to the general term, and

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the order of the special term was affirmed. HOGESBOM, J., in his opinion says, "after the decisions in *Haviland agt. White* (7 *How. P. R.* 157, and *The People agt. Flake and others*, 14 *id.* 528), it seems to me that we should treat section 318 of the Code as embracing cases of this description, and if so, that section contemplates that costs should be awarded against somebody."

A different doctrine was held in *The People agt. Heath* (20 *How.* 304). That case came up on certiorari from an order of referees, the same as the two cases last cited. The case was decided at general term in the eighth district, DAVIS, one of the judges, dissenting from the views of a majority of the court. MARVIN, J., who wrote the opinion, questions the reasoning of the learned judge in 14 *How.* 527, and arrives at the conclusion that no costs should be allowed to the prevailing party in such cases. He makes a distinction between *The People agt. Flake*, and *Haviland agt. White*, regarding the last case as the decision of a court brought before the supreme court for review; thus bringing it within section 318 of the Code. The decision in *Haviland agt. White*, was put upon the ground that it was a special proceeding under section 3 of the Code, and brought up for review under section 318, and the reasoning of the learned judge in his opinion in that case, would make the case at bar a special proceeding.

Although Mr. Justice MARVIN argues with some force in *The People agt. Heath*, that the third section of the Code, which is as follows: "every other remedy is a special proceeding," refers to remedies in courts of justice, yet after the unanimous decisions of the general term of two districts in favor of the principle here involved, I think there should be some hesitation in disturbing the doctrine there laid down. They must be regarded as controlling, and whatever doubts there may be must yield to the weight of the authorities which I have cited. Even if there should be a serious question upon the point discussed, I prefer to

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stand by the decision of the general term in this district, to adopting a rule which can only add perplexity to a disputed question. It perhaps should be remarked that when the case of *The People agt. Heath* was decided, the case I have cited from the third district, was doubtless unknown to the learned judge who wrote the opinion.

Upon the whole, I think that the relator is entitled to costs, and although the court made no provision for costs in its decision, that an application to the court for direction as to costs is the appropriate remedy, and the usual taxable costs should be awarded, to be paid by a tax to be levied upon the town of Schodack.

HOSKINS and GOULD, JJ., concurred.

UNITED STATES COURT.

JOHN M. MARTIN agt. THE SOMERVILLE WATER POWER COMPANY, AND OTHERS.

Interesting to bondholders.—An act of the legislature of New Jersey, “to relieve the creditors and stockholders of the Somerville Water Power Company, and of the Hudson Manufacturing Company,” and also a *supplementary act*, by which certain persons therein named were authorized to sell the whole of the mortgaged property at public sale to the highest bidder, free from all incumbrances, and after paying expenses and certain costs, to distribute the proceeds among the creditors according to the priorities of their several liens, *held to be unconstitutional and void*, as “impairing the obligation of contract,” in reference to a sale made under the acts, of the property and effects of the first-named company, where there were original outstanding bonds of that company secured by mortgage on its property, due and unpaid to the mortgagees, prior to the passage of the acts.

For the reasons, that any legislation which defeats the estate of the mortgagee without payment or tender of the whole debt due on the bonds; which gives a preference to posterior liens, and which deprives the mortgagee of his remedy given by the covenants of his contract, as also that given by the law of the land, impairs the obligation of contract, and is contrary to the letter and spirit of the constitution.

The act may be remedial as to the owners of the equity of redemption and those having liens against it, but the mortgagees have a right to say: we have never agreed to have our estate defeated to suit the convenience of others.

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The mortgage of the property and effects of the company having been given to three persons as trustees for the bondholders, the complainant as owner of a portion of the bonds, had a right to file his bill and make these trustees, together with all other parties interested, defendants; in which suit all the rights of the parties could be settled, and all equities adjusted.

These bonds were made payable to the holder, and of course transferable without assignment or indorsement, and the possession of them is *prima facie* evidence of ownership.

The complainant's title to four of these bonds (for \$500 each, the bonds in suit,) was not weakened by the facts that he knew at the time of his purchase that these bonds were pledged to a third person for an amount much beyond their value; that they were put into his (complainant's) hands for collection, and he advised that they should be sold, and they were taken from him for that purpose, and soon after returned to him with the information that they had been sold to another person for a small consideration, and the latter person then placed the bonds again in the hands of the complainant, where they remained for about five years, when the complainant purchased them as his own for \$500.

The effect of these facts was to strengthen rather than weaken the presumption of ownership of the bonds by the complainant.

But the complainant was not, in this suit, although commenced by him alone, entitled to carve out of the mortgaged premises sufficient to pay his bonds with interest, and leave the other bondholders to seek their remedy as they might. The latter were entitled to come in, either as defendants or petitioners for their proportion of the mortgaged premises.

A proposition to unite the Somerville Water Power Company with the Hudson Company, specifying the terms upon which the union should be made—that all the property of both companies should be vested in the Hudson Company clear of all incumbrances, and the business carried on under a charter of that company—the proposition to be valid if assented to by all parties therein mentioned, on or before the 1st day of May then next.

Held, that this proposition, as appeared from the evidence, was not assented to by all the parties, and was therefore void after the 1st of May—no party who had signed that proposition could have been successfully called upon for a specific performance of the covenants or agreements contained therein, merely because he had signed it. And it appeared further, that this proposition never afterwards became an agreement or contract, and never was obligatory upon any of the parties named therein. Therefore, the bondholders of the Water Power Company never became bound to surrender their bonds to the Hudson Company.

United States Circuit Court for the District of New Jersey.
Judge GRIER presiding.

In this case the constitutionality of certain acts of the legislature of New Jersey, which authorized the sale of the property of the company free and clear of all prior incumbrances, was argued at Trenton, by S. P. RANSOM, Esq., and the COMPLAINANT in person, for the complainant,

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and by the Hon. WILLIAM O. DAYTON and A. O. ZABRISKIE, Esq., for the defendants.

In 1848, the Somerville Water Power Company incorporated by the legislature of New Jersey, being indebted in the sum of \$50,000 to certain creditors in New York and Connecticut, for moneys advanced to the company, issued one hundred negotiable bonds for \$500 each, payable in 1853, with interest, and delivered ninety-six of them to such creditors in part payment of the company's indebtedness.

To secure the payment of these bonds, the company mortgaged all its real estate, franchises, water power and property at Somerville, to Mr. Williamson, late chancellor, and two other well known gentlemen of New Jersey, as trustees for the holders of the bonds. Many of these bonds were sold in the New York market, and the complainant became the owner of a part of them for value. In the meanwhile the company having become embarrassed transferred and merged itself into another corporation of New Jersey, called the Hudson Manufacturing Company, and the trustees transferred the mortgage to the last company, subject to the rights of the bondholders under it.

At length both companies became so embarrassed, and their property so incumbered by judgments, decrees sheriffs' sales and injunctions, that it was deemed almost impossible to make a title thereto by means of regular legal proceedings in the state courts, and the legislature was resorted to for aid. Accordingly an act was passed in the winter of 1856, "to relieve the creditors and stockholders of the Somerville Water Power Company, and of the Hudson Manufacturing Company," and also a supplementary act by which certain persons therein named were authorized to sell the whole of the mortgaged property at public sale to the highest bidder, free from all incumbrances, and after paying expenses and certain costs, to distribute the proceeds amongst the creditors according to the priorities of

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their several liens. In May following, the property which had been valued at \$150,000 was knocked down at \$50,000, at a sale made under these acts.

In this stage of the proceedings, the complainant filed his bill in the federal court for the district of New Jersey, to foreclose the \$50,000 mortgage, and prayed that the acts in question be decreed unconstitutional and void, on the ground that they violated the obligation of the contract between the bondholders and the water power company, and were repugnant to the constitutions of the United States and of the state of New Jersey. The constitutional question came up on demurrer to the bill, and the court held the acts unconstitutional and void, and granted a perpetual injunction against all further proceedings under them, and gave the following opinion:

GRIER, J. The demurrer to the bill in this case has been entered for the purpose of having a final hearing and judgment of the court on the validity of the act of the legislature of New Jersey, authorizing the receiver to sell the premises in question, free and discharged from the lien and estate of the mortgagees.

It is contended that this legislation is forbidden both by the constitution of the state and that of the United States.

Previous to the 29th of June, 1844, the state of New Jersey was governed by the old colonial constitution adopted on the 2d of July, 1776. This contained no bill of rights, nor any clear limitation of the powers of the legislature. The history of New Jersey legislation exhibits a long list of private acts and anomalous legislation on the affairs of individuals, assuming control over wills, deeds, partitions, trusts and other subjects usually coming under the jurisdiction of courts of law or equity—consequently the decisions of the courts of New Jersey of questions arising under the old constitution, cannot be cited as precedents applicable to the present one; which carefully

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defines and limits the powers entrusted to the legislature, the executive and the judiciary. It is very desirable that the constitution of a state should be construed by its own tribunals, and we regret that the researches of counsel have not furnished us with such precedents. The case of *Potts agt. The Delaware Water Company* (1 Stockton, 592), has reference to an act passed before the adoption of the present constitution. That act was declared by the court "not to impair the obligation of any contract," and to be remedial only. The first mortgagees gave their assent to the sales made under it, and others could not object to it as made without their authority. In this important respect it differs from the present case, and cannot be relied on as a precedent.

The validity of this act has been challenged on several grounds. If found invalid on any one we need not examine the others.

The constitution of New Jersey has not only carefully limited the powers of the legislature, and separated them from those of the judiciary, but it adopts the prohibitions of the constitution of the United States against *ex post facto* laws, and laws impairing the obligations of contracts, and with this addition "or depriving a party of any remedy for enforcing a contract which existed when the contract was made."

It is not contended that the act comes under the category of an "*ex post facto* law," and if it be merely remedial in its character, as defendants contend; there can be no valid objection to it under this head of the constitution.

Does it impair the obligation of the contract between the mortgagees and mortgagors, or deprive the mortgagees of any remedy which existed when the contract was made?

The act and supplement must be construed together as forming one act. It is entitled "an act to relieve the creditors and stockholders of the Somerville Water Power Company," &c. It sets forth in its preamble certain repre-

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seutations, made no doubt by those who procured the act, showing plausible reasons for such legislative interference. But the validity of the act must be judged from its actual operation on the rights of parties subjected to it, and not by the pretences put forth by the preamble. This may show that the legislature acted in good faith, and believing that their interference would wrong no one, but not that such was the actual result. Legislators cannot be too cautious when asked to interfere by special legislation, for particular persons or particular cases on *ex parte* representations. They cannot call all parties before them and judge upon a full hearing. This is for the courts. Their action may not always be unjust, but it may be, and often is, tyrannical and injurious.

Let us inquire what is the contract here, and how is it affected by this act?

The mortgagees of this property held the legal title in trust for the several bondholders, who may properly be treated as the real mortgagees. They may be said in common parlance, to have a "lien" or "security" on the property mortgaged, but they have it by force of their legal title to the property. It is an estate in fee simple, defeasible only by payment of the debt. When the condition of the obligation is broken, the mortgagees may enter on the premises and recover the rents, issues and profits thereof, till their debt is satisfied. If they see fit, they may appoint an agent or attorney, who may enter on the land under their direction, and make sale of the same, in satisfaction of the debt. This disposal of the mortgaged premises is to be made according to the discretion and judgment of the mortgagees, and not of another. No subsequent incumbrancer or assignee of the equity of redemption, can divest their estate contrary to their will, unless by a tender of the debt due. They cannot be compelled, to suit the convenience of others, to put up the property to sale at a time or in a manner which might lessen or injure

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their security. Now by this contract the estate of the mortgagees is defeasible only by payment of the debt. But this act permits the receiver to dispose of their estate, and does not provide that the debt shall be first fully paid. It permits the receiver to sell for any sum—whether it be sufficient for such purpose or not—and the receiver has made a contract of sale for a sum insufficient by many thousands of dollars. This is making a new contract for the parties, and impairing the obligation of the mortgage. It may be truly said, "'tis not so written in the bond." The mortgagees may dispose of their security for less than the amount of their debt, but no other person can.

2d. The obligation of this contract is moreover impaired by this act, in that it gives a precedence to certain indefinite costs and charges (not costs of the sale merely), to be paid out of the proceeds of the property before the mortgage debt. This is in direct contravention of the contract by which the estate was conveyed to the mortgagees free from all charges and incumbrances.

3d. The mortgagees had by their contract a remedy to be used at their own option and discretion, as to time and mode of sale, and by law, they had the remedy of entry on the premises, and receiving the rents and profits. This act deprives them of both, contrary to the letter of the constitution of New Jersey, without invoking the aid of the cases of *Bronson* agt. *Kinzie* (1 *Howard*, 311), and *McCracken* agt. *Haywood* (2 *Howard*, 611).

We have not thought it necessary to review the very numerous cases on the subject, or to attempt any metaphysical definition of what constitutes "the obligation of a contract;" as it is clear that any legislation which defeats the estate of the mortgagee without payment or tender of the whole debt due on the bonds, which gives a preference to posterior liens, and which deprives the mortgagee of his remedy given by the covenants of his contract, as also that given by the law of the

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land, "impairs its obligation," and is contrary to the letter and spirit of the constitution of New Jersey. This act may be remedial as to the owners of the equity of redemption and those having liens against it, but the mortgagees have a right to say, "*non in hac fœdera veni*." We have never agreed to have our estate defeated to suit the convenience of others. (*See 9 Barb. N. Y. Reports, 48.*)

The plaintiff is entitled to a decree making the injunction perpetual, but the defendants have leave to answer as to the other charges of the bill.

The constitutional question having been disposed of, the case came up again on the merits, and was argued by S. R. RANSOM and JOHN M. MARTIN, *Esqrs.*, for the complainant, and by WM. O. DAYTON, PETER D. VROOM, GEO. W. BROWN, A. O. ZABRISKIE and HUGH M. GASTON, *Esqrs.*, for the defendants.

United States Circuit Court, New Jersey, Third Circuit.
Before DICKERSON, J.

JOHN M. MARTIN, complainant agt. THE SOMERVILLE WATER COMPANY, and other defendants.

DICKERSON, J. In the month of February, 1840, the Somerville Water Power Company were incorporated, and soon after being organized, they became seised and possessed of certain land and real estate situate on the Raritan river, near Somerville, and proceeded to improve them by forming a canal, to create a water power for manufacturing purposes, and granting leases to different persons for the use of the water, reserving rents thereon.

Previous to the year 1848, in the execution of their enterprise, the company had become indebted to the amount of nearly \$50,000, to secure the payment of which amount on the 18th of February, 1848, they made one hundred

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bonds, bearing that date, each for \$500, payable in five years, with interest to be paid semi-annually; and for the purpose of securing the payment of those bonds with the interest, they gave a mortgage upon all their property to Benjamin Williamson, Alexander Wurts and Philemon Dickinson, as trustees for the bondholders, and soon after issued and put in circulation ninety-four of said bonds to their different creditors. After some years, four of those bonds came into the possession of the complainant, and the principal then being due and unpaid, and no interest paid, he applied to the trustees, and requested them to proceed and foreclose the mortgage, in order that he might receive the amount of his bonds with the interest thereon. For reasons satisfactory to themselves, the trustees refused to proceed, whereupon the complainant filed the present bill, in which he has made the trustees and all other parties interested, defendants. It is well settled in our courts that the complainant under these circumstances had a right thus to proceed, and this right was not seriously controverted upon the argument. But it was argued by counsel that the rights of the parties could not be settled and all equities adjusted in this suit as well as in some other mode of proceeding, but as such other mode was not suggested, I cannot perceive why all the equities of the case may not as well be adjusted in this suit as in any other which might be brought. If the trustees had filed the bill, the same questions would have arisen, and so if the Hudson company had been complainant, seeking relief.

The truth is, that the difficulties of the case, such as they are, arise from the nature of the case itself, and not from the mode of proceeding. The first question which presents itself is, whether the complainant is the owner of these bonds. They are made payable to the holder, and of course transferrable without assignment or indorsement; and it is well and properly settled that the possession of these bonds is *prima facie* evidence of ownership.

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It appears from the testimony of S. P. Lyman, that in November, 1848, these bonds were delivered to Mr. Ingalls (a stock broker in New York), with authority to sell them for the benefit of the owner; but he was directed not to sell these unless he could also sell certain others of the same kind, and that he had them in his possession for that purpose for a considerable time, but on being called upon to return the bonds he said that they had been taken from him by some one improperly. This testimony was objected to, and the objection certainly was well taken so far as regards the allegations of Ingalls, but it establishes the fact that the bonds were delivered to Ingalls to be sold for the benefit of the owners.

By the testimony of John D. Waugh, it appears that on the 20th day of November, A. D., 1848, Ingalls borrowed of Mrs. Waugh, the mother of witness, \$2,000, and pledged these four bonds, with other property, as security, giving a stock note authorizing the sale of the bonds at public or private sale, in case of default in payment of the money borrowed; and that Ingalls represented himself as the owner of the bonds, and borrowed the money for his own use. At this stage of the case a question arises whether, under these circumstances, Mrs. Waugh could hold those bonds as security for her loan. I have no doubt of her rights so to hold them; Lyman confided in Ingalls, delivered to him the possession of the bonds, and authorized him under certain circumstances to sell them. He pledged them to a bona fide pledgee without notice, claiming them as his own, and pledging them for his own benefit.

But it was urged on the argument, that the fact of taking securities for so large an amount over and above these bonds, ought to be considered as notice to Mrs. Waugh that Ingalls was not the owner. I do not think that there is any force in the argument, for although I cannot perceive why such an amount was taken, yet the result has proved that they did not take sufficient to secure the loan,

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and Waugh negotiated the loan for his mother, and who, as a witness, could probably have explained the reason why so great an amount of security was taken, if the party wishing to know had seen fit to examine him upon that point. At all events it cannot overcome the direct and positive evidence of Waugh, who stands unimpeached and uncontradicted before the court.

This point being established, and it being manifest that the balance due upon the loan of Mrs. Waugh, with the interest thereon, far exceeds the present value of the bonds, no person can have any interest in redeeming these bonds, and the only person who could have any interest in controverting the title of complainant is John D. Waugh, and he affirms that title. The complainant, however, does not rest his case upon this evidence, but claims as a bona fide purchaser of these bonds from Waugh, for a fair consideration, and without notice of any fact which can interfere with his title, and relies upon the testimony of John D. Waugh to establish his claim. By that testimony it appears that John D. Waugh was agent for his mother, Mrs. Waugh, and transacted her business; that he was a stock broker; that after receiving these bonds he put them into the hands of the complainant for collection, he being at the time an attorney at law; that the complainant advised Waugh to have the bonds sold, under which advice he (Waugh) had the bonds advertised in the public papers to be sold at auction, at a public place; that at the time of sale he (Waugh) being engaged, requested his friend Mr. Goodliffe, to go and attend to the sale, and buy the bonds for him; that Goodliffe returned and brought him the bonds, and said he had bought them for a small amount, there being no bid but his own; that he (Waugh) paid the auctioneer's bill for selling the bonds; that he then placed the bonds again in the hands of complainant, where they remained for about five years, when he sold them to him as his own property for \$500.

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In the meantime Goodliffe had died, and also Mrs. Waugh, leaving J. D. Waugh her only child and heir at law.

Such are the material facts connected with this branch of the case, and the question is, whether under these circumstances the complainant has a good title.

In the first place, it appears by the stock note itself that Mrs. Waugh had a right to sell the bonds either at public or private sale.

She preferred the latter course, and she advertised them for sale. No objection has been made nor could properly be made, either as to the mode of advertising or the place of sale, but there is no evidence as to the manner of sale, it only appearing that a sale was made, and that for a very small consideration.

But after the lapse of time, and the person who made the purchase being dead, I think it should be presumed that the sale was made in a proper manner.

But if this be not the fair and legal presumption, I cannot perceive that the title of the complainant is destroyed by any want of regularity which might have occurred in the sale. If J. D. Waugh had presented these bonds for sale at the time the complainant bought them, claiming them as his own, and if the complainant had never heard of them before, and had bought bona fide, for the \$500, he would have had a good title, upon the presumption that the holder of the bonds is the owner. In this case, did the complainant know anything connected with these bonds which should weaken that presumption?

He knew at the time of his purchase, that some five years before these bonds were pledged to Mrs. Waugh for an amount much beyond their value.

They were put into his hands for collection, and he advised that they should be sold, and they were taken from him for that purpose, and soon afterwards returned to him.

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There is no evidence that he had any notice of the mode or manner in which they were advertised and sold; but after the lapse of five years, and long after the death of Mrs. Waugh, leaving J. D. Waugh her only child and heir at law, he offers these bonds for sale to the complainant, claiming them as his own.

It appears to me that the effect of these facts would be to strengthen the presumption of ownership, rather than weaken it.

The delay in prosecuting these bonds was urged, to show that the complainant had no confidence in the validity of his claim, but it may be well answered that all the other parties interested in this suit are liable to the same objection, and that the complainant had greater confidence in his claim than any other one, as he first brought the case before the court for adjudication.

I am therefore of opinion that the complainant has established his title to the bonds upon which the suit is brought.

We have next to inquire as to the other bonds; whether they are outstanding, and if so, to whom they belong? which leads to an examination of the noted proposition of the 22d of April, 1851.

But the complainant insists that under the circumstances of this case, it is not important to inquire as to the other bonds, because having commenced his suit alone, he is entitled to carve out of the mortgaged premises sufficient to pay his bonds, with interest, and leave the other bondholders to seek their remedy as they may. In this respect I think he is mistaken, and that according to the course of equity proceedings, the other bondholders (if the bonds are yet in force,) must be entitled to come in, either as defendants or as petitioners, for their proportion of the mortgaged premises.

In order to understand the proposition of the 22d of April, 1851, it is proper to refer to an agreement made on

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the 7th of June, 1849, between Armstrong and Samuel P. Lyman.

It appears that they had conceived the idea of uniting the Somerville Water Power Company with the Hudson Company, and by that agreement specified the terms upon which the union should be made; the result of which was to be, that all the property of both companies should be vested in the Hudson Company, clear of all incumbrances, and the business carried on under the charter of that company. In order to carry out this agreement the proposition of the 22d April, 1851, was made. This was a proposition to be valid if assented to by all the parties therein mentioned, on or before the 1st of May then next. It was not assented to by all the parties, and therefore was void after the 1st of May. No party who had signed that proposition could have been successfully called upon for a specific performance of the covenants or agreements contained therein, merely because he had signed it. They were no more bound than those who had not signed it. But did this proposition afterwards ever become an agreement?

There is no direct evidence to establish the affirmative; on the contrary H. B. Loomis testifies, that he put the bonds of his father, his brother and Dr. Green, into the hands of Chas. J. Gilbert, *in escrow*, to be held until all the parties should execute the agreement. "That this was about two months after the date of the contract, and they remained there about two or three months, at which time Mr. Gilbert became convinced the contract could not be carried out, and returned them voluntarily, and I returned them to the parties to whom they belonged."

And Mr. Gilbert upon this subject swears that "H. B. Loomis for himself, his father James Loomis, and his brother O. B. Loomis, also Edward A. Cook, placed the bonds belonging to them in my hands, with full authority to surrender them to the Hudson Company, provided S. P.

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Lyman surrendered his bonds." And being asked how long they were in his possession? he answers, "I think they were in my hands above a year, from May, 1851, to May, 1852." And further he says, "I surrendered them to H. B. Loomis, at his request."

Mr. Gilbert at this time was secretary of the company, although he received these bonds in his individual capacity.

And H. B. Loomis, who was elected a director in the Hudson Company, when asked upon his examination how long he acted as director, says: "for a few months; the latter part of the year I did not act, but gave it up—abandoned it; I used my best efforts to overcome the difficulties, to induce the parties to perform the contract for the purpose, if possible, of getting the debt Loomis and Lyman owed me." And being asked why he ceased to act, he says: "because I found it impossible to get the parties to perform the agreement."

And S. B. Lyman, in answer to the question whether the affairs of the Hudson Company were not in an unsettled state after the date of the agreement of the 22d April, 1851, answers: "they were; some of the parties went on in good faith to carry out what they had undertaken to do by the terms of that agreement, but others did not; some for one reason, and some for another." And further he says: "they never have been settled, but became more and more confused, according to the number of losses."

Thus it is abundantly manifest that the proposition of 22d April, 1851, never became a contract, and never was obligatory upon any of the parties named therein.

And this must have been the understanding of the Hudson Company at the time, for although they proceeded as if that proposition was to be carried out, and no doubt with hope, and possibly with the belief that it would be, yet their conduct clearly proves that they did not consider that it had been carried out, or that the parties were bound to carry it out.

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By the terms of the proposition of April 22, it was to be executed on or before the 1st of May then next, and the bondholders and others holding claims, were "to release and transfer immediately to the Hudson Manufacturing Company all and singular their interest in, or claims, or pretended claims upon or to the Somerville Water Power Company," &c.

On the 7th of June, one month and seven days after these bonds were to be released and transferred to the Hudson Company, the directors had a meeting and adopted many resolutions, among which was one directing their president and secretary to take possession of the Somerville property. And in the meantime, Judge Nevins, on behalf of the trustees, had assigned to the Hudson Company the mortgage given to secure the payment of the bonds.

And although it was the great point in the case to have these bonds transferred and assigned; although by the terms of the proposition they were to be transferred and assigned immediately; although the accompanying mortgage was transferred, yet not a single bond was transferred; no demand made for such transfer; no complaint that such transfer was not made; and in fact nothing said or done upon the subject at this meeting, nor any other meeting of the directors, during the short, fitful existence of the operations of this company.

This conduct is totally inconsistent with the idea that the Hudson Company at that time considered that the bondholders were bound to surrender their bonds.

But it is insisted that some of the present bondholders by their conduct since the 1st of May, 1851, have become bound to surrender their bonds and take stock in the Hudson Company, even if the other bonds are not surrendered. The present holders, as appears by the evidence, are: the complainant, holding 4; Jas. Loomis, 14; Horace Green, 7; Allen Clark, 5; Chs. Ely, 16; Isaac C. Loomis, 4; Edw'd

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Cook, 11; Ann Elmendorf, 6; which with the six bonds not issued, and eighteen outstanding in unknown hands, make up the whole number.

It appears by the evidence in the case, that some of these holders of bonds consented to take stock in the new company, and that they participated in its organization, and were elected directors, and served in that capacity for some time; and the question arises whether this conduct should be considered as evidence that they had agreed or were bound to surrender these bonds in case the other bondholders refused.

I do not think that such is the true or fair construction to be put upon their conduct. In the first place it would have been egregious folly on the part of the bondholders to adopt such a course, and most dishonest on the part of the company to insist upon it.

But it is manifest that neither party at the time considered that they were bound to surrender their bonds unless all united. Otherwise they would have taken an assignment of the bonds at the time they issued the stock. Moreover, it appears by the testimony of Mr. Gilbert, who was secretary of the company at the time, that Edward A. Cook had deposited his bonds in the hands of Mr. Gilbert, with power to surrender them to the company only in case Mr. Lyman surrendered his, and that the bonds remained thus in his hands for about a year, during which time he was acting as president of the company, and holding their stock. Thus showing clearly that it was not at that time understood by any of the parties that these bondholders should be bound to surrender their bonds unless they were all surrendered. As to the assignment of the mortgage made by Judge Nevins, as attorney for the trustees, to the Hudson Company, I do not think it important to inquire particularly whether Judge Nevins had any other power of attorney than those exhibited.

For upon examining the assignment itself, it appears

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that they assign the mortgage, leases and other securities to the Hudson company, "to hold to them and their assigns forever, with the same rights touching the same, as were vested in or were granted to us as trustees thereof, with the same power to enforce them." Thus merely transferring a naked trust without assigning any interest.

But if the assignment had been an absolute assignment of these securities, it would have been void, for it was made, and so expressed to be made, upon the ground that "it was with the assent of the *cestuis que trust* and holders of said bonds first obtained." And of course the condition upon which the assignment was made having failed, the assignment itself as to these *cestuis que trust* and bondholders is void.

I am therefore of opinion that of the hundred bonds directed to be issued by the Somerville Water Power Company, but ninety-four issued, and that they are in full force and unsatisfied. Of these ninety-four bonds, seventy-six belong severally to the parties hereinbefore named, who have appeared in this case, and the remaining ones belong to persons unknown to the court. I am further of opinion that the mortgage, assignments of leases and other securities, which were made to Benjamin Williamson, Philemon Dickinson and Alexander Wurts, as trustees, to secure the payment of those bonds, with interest, are also in full force and effect. And that all the real estate therein described (except such parts thereof as in the meantime have been sold by virtue of prior liens), and all the leases with the rents due thereon, and all the unappropriated rents received from those leases by the receivers, John M. Mann and Joshua Doughty, must be applied to the payment of those bonds, with the interest thereon.

Let a decree be entered accordingly. Also let a rule be entered requiring one of the commissioners of this court to ascertain and report the amount due upon said bonds, specifying the number of each bond, and to ascertain and

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report the quantity and description of the real estate embraced in said mortgage and assignments, which now remains unsold by virtue of prior liens. Also the number and description of the leases, with the rents in arrear upon each.

And also, the unappropriated balance of the rents which have been received upon these leases by the said receivers, John M. Mann and Joshua Doughty.

SUPREME COURT.

SHELDON, receiver &c. agt. ADAMS.

SAME agt. WHITEBECK AND JONES.

SAME agt. DANIELS AND HUTCHINS.

SAME agt. STARBUCK.

Where a *receiver* of an insurance company brings an action as such, and pending the action he is *removed* and another person is duly appointed receiver in his place, it is proper and right to *substitute the successor* as plaintiff in the action. The *death afterwards*, of the *first receiver* does not abate the action, nor affect it in any respect.

There is no authority or power in the court to permit an *amendment* of a complaint by inserting the *addition* of an independent cause of action, inconsistent with the original. To wit: to an action on premium notes given to a mutual insurance company, to *recover assessments* thereon, the addition of a further cause of action or count on the notes as *original formation or stock notes*; especially when these notes would be barred by the statute of limitations, unless saved by being incorporated in the old action.

It has been stated in several cases that amendments will be allowed, even though the effect be to *change* entirely the cause of action or defence. But there is no case in which it has been decided that an amendment may be made by *adding* a distinct and independent cause of action, inconsistent in all its material bearings with that already stated in the complaint.

An order of the court allowing the amendment of a complaint of an additional, independent and inconsistent cause of action, is reviewable on appeal, on the grounds of want of jurisdiction to make it, and as involving a substantial right.

Saratoga General Term, May, 1863.

POTTER, BOCKES and JAMES, Justices.

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AN appeal was taken from an order in these actions, made at special term, substituting Frederick A. Sands, who is now the receiver of the Columbian Insurance Company, in the place of Sheldon, removed; and also allowing an amendment of the summons and complaint therein.

G. M. HARWOOD, *for appellants.*

HENRY R. MYGATT, *for respondents.*

BOCKES, J. The actions were brought on premium notes, alleged to have been given to the company prior to its dissolution, and the complaint in each case averred losses and due assessment of the notes, and a recovery was claimed for the amount of the assessments. The amendments allowed by the order from which the appeal was taken, was to the effect that the plaintiff might add in each case a further cause of action or count on the notes, as original formation or stock notes.

I am unable to see any valid or substantial objection to the order so far as it permits the substitution of Mr. Sands as plaintiff in the actions in the place of Mr. Sheldon. It seems that Mr. Sheldon had been removed, and Mr. Sands appointed in his stead. It was therefore appropriate and proper to allow and direct such substitution. It is urged that the action abated by the death of Mr. Sheldon, which occurred in July, 1860. But this plainly is no answer to the motion for substitution. It was not a motion to revive the actions, and the cases stood the same as if Sheldon was still living. If living it would have been proper to substitute Mr. Sands as soon as he was appointed, to supersede or succeed Mr. Sheldon as receiver. The facts disclosed by the papers are these: Sheldon as receiver, commenced the actions in 1853, and they were put at issue early in the year 1854. In 1859 Sheldon was removed, and Isaac Jackson was appointed in his place. In 1861, Mr. Jackson was removed, and Mr. Sands was appointed in his place. Sheldon died in 1860, after his removal. Now so

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so soon as Mr. Jackson was appointed in the place of Mr. Sheldon, it was his right to be substituted as plaintiff in the actions in the place of Mr. Sheldon, and on the removal of Jackson and the appointment of Sands, it was the right of the latter to be substituted in Jackson's place. The decease of Sheldon did not take away those rights or either of them, indeed, his decease had nothing to do with the question. Nor can it make any difference that Jackson was not in fact substituted in the action as plaintiff, in the place of Sheldon. Mr. Sands succeeded to the rights and duties of Sheldon and Jackson, respectively, as receiver, and his substitution as plaintiff was properly allowed by the order of the special term.

The important question on this appeal is in regard to the permission given by the order to amend the complaint in the several actions. The effect of such permission is to allow the plaintiff to introduce into each suit an entirely new and distinct cause of action; one too barred by the statute of limitations, unless saved from the operation of the statute by incorporating it into an old suit. Can this result be attained under the guise of an amendment? It is claimed that it may be under section 173 of the Code, which declares that the court may, in furtherance of justice and on terms, amend any pleading "by inserting other allegations material to the case." It becomes necessary now to determine what the plaintiff's case was as made or attempted to be made by his complaint. It was a case for a recovery on a premium note, alleged to have been given on an application for insurance, on which a recovery could be had only after due assessment. And this case it was not proposed to change in any respect. The plaintiff then claimed to recover on a contract of a special character. Did he base his application to amend on omission of some allegation which by possibility might be material to his right of recovery on it as a premium note? Not at all. The amendment was not asked for to cover any error,

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omission or mistake in the original pleading. His case as it stood was perfect. He needed then no amendment, for there was no allegation omitted or improperly inserted. But to a perfect complaint he wished to add a cause of action not suggested by the original pleadings, a cause of action in direct contradiction of it. Can this be deemed an amendment of the original, when in fact it is destructive of it? Plainly it can not, and if not, then there is no authority for the order which allows the addition of a distinct cause of action inconsistent with and destructive of the original, without removing the original from the record. Suppose a party holds two promissory notes, both past due, and made by the same person, on one of which he commences an action. Can he after the action has been at issue ten years, introduce into it the other note, under the pretence of an amendment of the original complaint and cause of action? I think not. In my judgment this was not contemplated by section 173, which admits of amendments of pleadings in furtherance of justice, "by inserting other allegations material to the case." The case at bar is more objectionable than that supposed, for the reason that the plaintiff proposes to insert, by way of amendment, allegations inconsistent with those on which the action was originally based, and that too without alleging any omission or mistake. It has been stated in several cases that amendments will be allowed, even though the effect may be to change entirely the cause of action or defence. But there is no case within my observation, in which it has been decided that an amendment may be made by adding a distinct and independent cause of action, inconsistent in all its material bearings with that already stated in the complaint.

The case of *Birdseye, receiver agt. Smith* (32 Barb, 217), is not in point. There was no question in that case as to the power or authority of the court to allow amendments of pleadings. The question there was whether the plain-

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tiff should be compelled to elect between the two causes of action stated in the complaint, and determine on which he would proceed. But if that question were before us on this appeal, as at present advised, I could not accede to the doctrine of that case. In my judgment, a complaint which cannot by possibility be verified—one that is untrue on its face—is not contemplated by the Code of Procedure, the leading feature of which is the attainment of simplicity and truthfulness in pleading.

Does a complaint containing two counts, each contradictory of the other, show or state a cause of action? The first count is contradicted on the record by the second, and the second by the first. Certainly in such case there can be no recovery until the record is reformed.

It seems to me that there is no authority or power in the court to permit by amendment an addition of an independent cause of action, inconsistent with the original. There may be cases where justice would require a change of the cause of action, but that was not this case. It was not proposed to change the action from an action on a premium note to an action on a stock note. If there was no authority in the court to make the order, the granting of the motion was not a matter of discretion simply. The order is therefore open to review on appeal. It is open to review on appeal too, inasmuch as it affects a substantial right. (10 *How.* 253; 22 *Barb.* 161.) The defendants had a right to their defence of the statute of limitations, and the order in effect deprived them of that defence.

In my judgment the order appealed from should be affirmed, so far as it permits and directs Mr. Sands to be substituted as plaintiff in the action, and reversed as to all the rest.

Bendit agt. Annesley.

SUPREME COURT.

ADOLPH BENDIT, and others, appellants agt. ISAAC ANNESLEY and another, respondents.

Before the Code, a payment after suit brought had to be pleaded specially in bar of the *further continuance of the action*, and not in bar of the action generally—the plea was required to have a formal conclusion. The Code has abrogated the necessity for any prayer or formal conclusion; and an answer which sets up payment specially, after suit brought, is good, although it demands that the complaint be dismissed, and judgment for costs.

In an action on a promissory note, where the defendant on the second day after the action is commenced pays the full amount of the note, interest and protest, which is received and kept by the plaintiff, he cannot afterwards recover his *costs*. If the plaintiff meant to insist on the payment of the accrued costs, he should have refused to receive the payment of the debt unless the costs were also paid. The payment of the principal—the debt, extinguishes the incident—the costs.

New York General Term, May, 1864.

Before LEONARD, P. J., CLERKE and WELLES, Justices.

THE action was commenced on the first day of November, A. D. 1862, by the service of the summons and complaint on the defendants.

On the second day of November, the defendants enclosed a check for four hundred and four and 21-100 dollars, also two dollars in bills, to the plaintiffs in a letter, which was afterwards received by them.

The check and the money so sent amounted to the face of the note, interest, and cost of protest.

That there was no payment of costs, or tender of payment of them.

That on the 17th day of November following, the plaintiffs duly notified the defendants that payment of the face of the note, interest and protest, would not settle the action, but that the costs must be paid. On the 21st day of November, the defendants answered, pleading payment.

The only issue in the case was whether under the circumstances, the answer of defendants of payment, and

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proof of same, prevented a recovery by plaintiffs. The action was tried by the court, before Hon. CHARLES MASON, who dismissed the complaint, and the defendants appealed.

W. H. TEFFT, *for appellants.*

I. An action having been commenced by the plaintiffs, they were entitled to the costs allowed by the statute in such cases; and payment or tender of payment on the part of the defendants, to be an effectual defence, must inclose the costs allowed by the statute, unless there was special agreement of plaintiffs to waive them. (§ 322 *Howard's Code*, p. 533; *Rockfeller* agt. *Widerwax*, 3 *Howard*, pp. 382-3-4: *Bogardus* agt. *Richtmeyer*, 3 *Abbott*, p. 179.)

"Payment of a debt alone, without the costs made after suit brought, is not a good payment to bar the action. Costs, with nominal damages, may still be recovered, at least up to the time of payment." (*Parsons on Contracts*, note u, p. 130, vol. 2, and cases there cited.)

II. There was no agreement on the part of plaintiffs to receive the amount in settlement of the suit. On the contrary, they distinctly notified the defendants by letter, before answer, that the suit could only be settled by payment of costs.

The defendants understood the matter was not to be settled without payment of costs, and undertook to arrange for payment of costs. (See testimony of defendant *Annesley*, folios 14 and 15, p. 5 of the case.)

III. Judgment should be reversed, and judgment ordered for plaintiffs, with costs of the appeal.

SAMUEL G. COURTNEY, *for respondents.*

The defendants' certified check, and balance in money, was accepted without any qualification by plaintiffs, in payment of the demand—the note.

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I. The plaintiffs indorsed the check, and through their bank collected the amount of it. (*Vide testimony of Annealey, fols. 12, 19.*)

II. When the check and money were sent to plaintiffs, it was the contract of the defendants with the plaintiffs that they should be received in satisfaction and payment of the note. (*See letter of defendants to plaintiffs, at fols. 16, 19.*)

III. The note was therefore paid, and the cause of action satisfied; and the plea of payment was a good and sufficient defence to the action.

1. It was properly pleaded. (*See Code, §§ 147, 148; § 150, sub. 2.*)

2. Any defence which accrues up to the time of answering, can be set up in the answer. (*Willis agt. Chipp, 9 Howard, 568; Beals agt. Cameron, 3 Howard, 414.*) The same doctrine was held by superior court, general term, *Carpenter agt. Bell et al.*, BOSWORTH, C. J.

IV. The judgment should be affirmed with costs.

By the court, BARNARD, J. As the law stood prior to the Code, a payment after suit brought had to be pleaded specially in bar of the further continuance of the action, and not in bar of the action generally. (*Boyd agt. Weeks, 2 Denio, p. 321.*)

This was the doctrine at the time when every plea was required to have a formal conclusion.

Under the Code no formal conclusion is required, and no judgment or relief is required to be prayed for except when the defendant asks affirmative relief against the plaintiff.

The answer in this case specially set up the payment, and would have been good under the old system if it had prayed judgment whether the plaintiff should further maintain his action.

As the Code has abrogated the necessity for any prayer,

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I think the answer now good, although it demands that the complaint be dismissed, and judgment for costs.

Even if a prayer were required to an answer, and the prayer in question was technically wrong, yet as evidence was received under the answer without objection, and fully sustained it, the judge under the liberal powers of amendment given by the Code, was justified in disregarding the technical defect.

I do not regret coming to this conclusion; for after the payment of the note, it is obvious that the only motive in prosecuting the suit was to get the small amount of costs which had accrued; which costs, I think defendants under the circumstances of this case were not liable for.

Costs of a suit are but an incident to the debt, to recover which the action is brought. The extinction of the principal carries with it the incident.

If the plaintiffs meant to insist on the payment of the accrued costs, they should have refused to receive the payment of the debt unless the costs were also paid.

As between the plaintiffs and defendants (there being no fraudulent collusion to deprive the attorney of his costs), the plaintiffs having accepted debt, interest and protest, the principal became extinguished, and the incident—the costs—went with it.

Judgment affirmed, with costs.

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SUPREME COURT.

EDWARD ELLSWORTH, appellant, agt. GEORGE CALDWELL
AND JOSEPH W. CALDWELL, respondents.

A discharge under insolvent proceedings, commonly called the two-third act, is *personal*, and does not operate to discharge a *joint obligor* with the insolvent. Therefore, where the plaintiff, the owner of a joint judgment against the defendants, obtained for a partnership debt, relinquishes or assigns the judgment to the assignees of one of the defendants, by petition in insolvent proceedings under the statute, and such defendant subsequently obtains his discharge in such proceedings, the plaintiff cannot afterwards enforce his judgment against such insolvent.

But such proceedings do not affect the liability of the other joint judgment debtors; and the judgment may be enforced against them notwithstanding such discharge of the co-defendant.

In case, however, the remaining defendants should subsequently pay the judgment, they could enforce contribution from the insolvent defendant—such judgment creating a demand arising after the discharge.

New York General Term, May, 1864.

Present—LEONARD, P. J., BARNARD and CLERKE, J. J.

THE appeal in this action is from an order denying a motion for leave to issue an execution on a judgment recovered by the plaintiff against the defendants in October, 1855, on a copartnership or joint obligation of the defendants.

The defendant, Joseph W. Caldwell, was afterwards, in May, 1856, discharged from his debts as an insolvent under the two-third act. The plaintiff was one of the petitioning creditors for the discharge and under the provisions of the eleventh section of the act, added to his signature to the petition a declaration in writing that he relinquished the judgment to the assignees of the insolvent, for the benefit of his creditors.

WM. A. COURSEN, *for Appellant.*

IRA D. WARREN, *for Respondents.*

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I. At the time the plaintiff made his motion for leave to issue an execution, he was not the owner of the judgment in question, and had no title thereto, nor interest therein.

Joseph W. Caldwell was discharged from the judgment.

When the plaintiff became a petitioning creditor for Joseph W. Caldwell, he added to his signature to the petition a declaration in writing that he relinquished the judgment in question to the assignees for the benefit of creditors, &c. This declaration operated as an assignment of the judgment to the assignees, and vested in them all the interest Ellsworth had in the judgment, which was the claim he had against George Caldwell, who was not discharged therefrom. The statute reads as follows, viz.:

§ 11. *Whenever a petitioning creditor under the first, second, third, or fourth articles of this title, shall have in his own name, or in trust for him, any mortgage, judgment, or other security, or assignment by way of security for securing the payment of any sum of money upon any real or personal estate of the debtor in respect to whom or whose estate he is a petitioner, he shall not become a petitioner in respect to the debt so secured, unless he shall add to his signature to the petition a declaration in writing that he relinquish to the assignees or trustees who shall be appointed pursuant to such petition, every such mortgage, judgment or other security for the benefit of all the creditors of such debtor; which declaration shall operate as an assignment of such mortgage, judgment, or security, to the assignees, or trustees who shall be subsequently appointed under the proceedings upon such petition, and vest in them all the rights and interest of such petitioning creditor therein.* (3 R. S. 5th ed. p. 110, § 11.

Article third of the title referred to in the above section 11 is the two-third act under which Joseph W. Caldwell obtained his discharge. (3 R. S. 5th ed. p. 91, §§ 1, 2.)

The design of the provisions contained in section 11 before referred to, was to equalize the proceeds among the different creditors. It was not the intention of the statute

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to allow a man who had a judgment against A and B jointly, to sign a petition to discharge A, and then, after the discharge of A, collect the entire amount of B; while a party signing the petition, who had a judgment against A alone, would lose his debt, the party having a judgment against A and B might collect the entire amount of B; thus, while using the full amount of his debts to deprive others, who did not sign A's petition, of their claims against A, loses nothing himself.

This statute equalizes it by making the judgment, as against the party not discharged from it, assets in the hands of the assignees, which it is their duty to sell, and divide the proceeds amongst all the petitioning creditors.

The plaintiff might have bought the judgment at the assignee's sale as against George Caldwell; and if he had paid more for it than others, the petitioning creditors, himself among them, would have received larger dividends.

This provision of the statute is just and equitable, and is applicable to just such a case as this.

II. The Judge who made the order at special term, gave the plaintiff leave to bring an action on his judgment, should he be so advised. This has been the universal practice of this court, where questions of this character have arisen. The court have declined to try them upon affidavits, and have left the party to their action on the judgment, which is what the Judge did in this case. (See order.) (*Dresser* agt. *Skufeldt*, 7 *How.* 85; *Russell* agt. *Packhard*, 9 *Wend.* 431; *Reed* agt. *Gordon*, 1 *Cowen*, 50; *Noble* agt. *Johnson*, 9 *Johnson*, 259; *Betts* agt. *Garr*, 1 *Hilton*, 411.)

By the Court, LEONARD J. The assignees claiming that the relinquishment of the judgment to the assignees, operated, under the last clause of the said eleventh section, as an assignment, sold it to one Sampson. The defendants

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resist the motion upon the ground that the plaintiff is no longer the owner of the judgment, and has no power to take any proceedings to enforce its collection.

They also insist that the relinquishment operates to discharge both defendants, and that if the plaintiff has any rights against the defendants or either of them by virtue of this judgment, he should be remitted to his action, and not be permitted to try the question on affidavits by motion.

A reference to a few well settled principles of law will show that these positions are untenable.

1. The relinquishment or assignment of a judgment releases or transfers the debt as well as the security—the debt being merged in the judgment.

2. The discharge under insolvent proceedings is personal, and does not operate to discharge a joint obligor with the insolvent. (*Tooker agt. Bennett*, 3 *Caine's R.* 4; *Moore agt. Paine*, 12 *Wend. R.* 123.)

3. In case the other defendant, George Caldwell, should be compelled to pay the judgment after the discharge of Joseph, under the insolvent laws, the insolvent Joseph will be liable to George for contribution, because such payment creates a demand arising after the discharge. (*Ford agt. Andrews*, 9 *Wend. R.* 312; *Frost agt. Carter*, 1 *Johnson, Cases* 73.)

The liability for contribution does not accrue till after the payment of the debt by George — no valid law can be enacted which attempts to discharge a demand which has no existence at the time of granting the discharge, or having a prospective operation. (*Ford agt. Andrews, supra.*)

The obligation of one of two joint debtors composing a partnership, is not in the nature of a security for the other within the meaning of section 11, of the act commonly called the two-third act. That section it is true, requires the petitioning creditors to relinquish any judgment or other security held by them upon any *real or personal estate*

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of the debtor, and the relinquishment is to operate as an assignment of the security to the assignees of the insolvent debtor.

The judgment against George is not a lien upon any real or personal estate of Joseph, the insolvent, and for that reason it cannot be held to be included in the relinquishment executed by the plaintiff in this case.

The relinquishment in this case operates only so far as the judgment is a security upon the real or personal estate of Joseph.

The judgment as against George, remains the property of the plaintiff, wholly unaffected by the discharge of Joseph, which is personal in its operation, and takes its effect by the authority of statute.

There is no occasion to remit the plaintiff his action to determine the effect of the discharge in favor of Joseph. Its validity is not denied.

The legal effect of it in respect to George is the inquiry here. None of the facts are in dispute. No question of fact is attempted to be put on trial. The course suggested is adopted only where the facts are at issue.

The plaintiff is entitled to enforce his judgment as against George Caldwell, but as to Joseph Caldwell, the motion must be denied.

The order appealed from must be modified accordingly, but without costs.

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SUPREME COURT.

THE PEOPLE *ex rel* GILBERT ROBINSON agt. BENJAMIN FERRIS
and others.

Referees, appointed under the statute by the county judge, for the purpose of hearing an appeal from the decision of commissioners of highways, in reference to laying out a highway, &c., possess all the powers that were formerly possessed by three judges of the late common pleas, under the provisions of Title 1, Art. 4, Ch. 6, Part 1 of the Revised Statutes.

But such referees have no express powers given under the statute, and none incidental to those expressly given, which authorizes them to *open a case for a rehearing upon the merits*, after the testimony is closed and the case *finally submitted to them for their decision*.

It seems, that where by *accident or mistake* a party interested has been deprived of any hearing, or of only a partial hearing, the referees have the power, upon due notice given, to open the case for rehearing after it has been submitted.

Fourth District, Schenectady General Term, 1863.

THIS is a common law certiorari to review the proceedings of referees appointed by the county judge of Washington county to determine an appeal brought by the relator from the determination of the commissioners of highways of the town of Argyle in laying out a highway through the lands of the relator. There is no question arising as to their appointment, or as to the regularity of their acts, until after they had heard the proofs and allegations of the parties. At the time of hearing these proofs, the parties and their counsel present, after taking certain testimony, agreed upon the number of witnesses to be sworn, who were accordingly sworn and examined by the parties in pursuance of such agreement, and the commissioners and appellant then submitted the matter to the referees for their decision. This was July 15, 1857. No adjournment was asked for by either party for the purpose of offering more testimony, but the referees adjourned indefinitely as to *time*; but fixing Sandy Hill as the place to meet to make

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their *decision*, and two days afterwards, to wit, 17th July, 1857, did meet for the purpose of deciding the same. Upon consultation, two of the referees were of opinion that the opening of the road was not of sufficient importance to justify the expense of opening it. One referee came to no conclusion for want of sufficient evidence. It was then agreed between two of them, that one, to wit, Weston, should draw up a decision in blank, and that Ferris, the other referee of the same opinion, was to take the paper and fill certain blanks therein; but it was not to be signed nor any final decision made until another meeting should be had on an adjourned day. Weston drew up a blank decision in form reversing the determination of the commissioners, and they adjourned. Ferris took the said blank decision, filled it up, and signed it before the adjourned day arrived; but on what day does not appear. Several of the inhabitants of the town of Argyle appeared before the referees at Sandy Hill, and upon affidavits setting forth facts and reasons for so doing, applied to the referees to have the matter opened and take further evidence in the matter upon the merits. At the adjourned day last before mentioned the referees again met, and then *two* of the referees refused to decide the appeal, and adjourned to a further day, and then information was given to the relator's son of the application that had been made to open the hearing.

The referees again met 24th July, 1857, and William D. Robinson, the relator's said son, who appeared for him, requested them to suspend their decision upon such motion till the 7th August next, to give him time to interpose legal objections to granting such application.

Their decision was postponed to 7th August, on which day the relator, by his counsel, objected to a further *hearing*, and insisted that they could not entertain such application without affidavits, &c. Two of the referees then decided that such affidavits should be presented. The

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commissioners' counsel then read affidavits of five inhabitants of Argyle in favor of the application. The relator's said son then asked for time in which he would furnish counter affidavits. The referees then again adjourned to 14th August, at which time the parties agreed that the time for this purpose should be further extended to 10th October, on which last day the relator's said counsel objected to the further hearing of the said appeal. First, that they had no right; and second, that this was not a proper case to exercise it, and he read the affidavits of eight persons for that purpose. The counsel for the commissioners then proposed to read affidavits in reply, which was objected to, but allowed by the referees, and read. Arguments against allowing the application and in favor of it were then made, and another adjournment to the 19th October was made to allow the relator's counsel to furnish authorities in reply, which being furnished in writing on the last day, two of the referees (all being present), decided to grant a further *hearing* of the appeal, and appointed the 25th November, 1857, at a certain place for that purpose, and written notice was given to the relator's counsel, but *no other notice* was given to the relator; on which last-mentioned day, on account of sickness of the relator's counsel, a further adjournment was had till 15th December, 1857. On this day all the referees and the counsel for the parties were present. The relator's counsel again objected before the said referees to receiving any further evidence on the part of the commissioners, on the ground that the matter had been before the referees, testimony heard and closed, the matter submitted to them for consideration, and having been considered and passed upon by them, they had no power to re-open the case and receive further testimony. These objections were overruled by the referees, and the relator excepted; the commissioners then proceeded and offered new evidence.

The case was again adjourned from time to time. The

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relator's counsel remaining and cross-examining witnesses, raising objections, and calling and examining witnesses on his side, proofs were again closed 16th January, 1858; various meetings of two of the referees and adjournments were had until the 26th January, 1858, when all three were present; two of whom decided to affirm the determination of the commissioners—Ferris refusing to sign the decision, and the decision was filed in the town clerk's office of Argyle 29th January, 1859. This decision, being considered as defective in form, inasmuch as it did not show upon its face that all the referees were present, or had met at the time it was made. The two referees who did sign it afterwards, on the 5th February, 1858, without concurrence, consultation with, or notice to the other referee, filed a supplemental order or statement showing that all the referees were present, and they annexed to it their former decision.

These proceedings are for review.

U. G. PARIS and J. S. COON, *for the commissioners.*

R. L. McDougall and TIMOTHY CRONIN, *for relator.*

By the court, POTTER, Justice. The referees in this cause acquired jurisdiction of the matter by their appointment, and they then possessed all the powers that were formerly possessed by three judges of the common pleas of the county under the provisions of title 1, art. 1, chap. 6, part 1 of the Revised Statutes. It is necessary, therefore, to look at the statute referred to, in order to see what powers such three judges did possess. By § 87 (1 *Revised Statutes*, 518), notice was required to be given to the commissioners, and to one or more of the applicants for the road, specifying the time and place at which the judges (now referees) will convene to hear the appeal. This was done. By § 88 (*p.* 519), eight days' notice was required to be given of the time mentioned therein to the commissioners

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and applicants, and the manner of service is specified. Of all this, there is no complaint. By § 89, it shall be the duty of the judges to convene at the time and place mentioned in the notice, and to hear the proofs and allegations of the parties. *They shall have power to issue process to compel the attendance of witnesses, and may adjourn from time to time as may be necessary.*

All the power expressly conferred to direct or control the action of the referees upon the hearing, or of the mode of conducting the appeal, is above stated. Every other power which they can exercise must be such as is incident to their express powers. The effect of their action *within* their powers need not at this place be referred to. It is their *duty to determine*, and they are empowered to compel the attendance of witnesses, about which no question is raised, and all power conferred beyond this is: "They may adjourn from time to time *as may be necessary.*" So far as adjournments were concerned, there was no limit, so long as adjournments were necessary, and which, as a matter of discretion with the referees, they had most undoubted power; but adjournments for further hearing were no longer *necessary*, by the acts of the parties and by their own. When the case had been submitted, there was an end to the *hearing*. It was then left with the referees for *decision*. The adjournments for the *decision* were, perhaps, *as necessary* as adjournments for the hearing, and the power to adjourn, I have no doubt, still remained as a necessary incident of the power to decide. They *then* entered upon the duty of *deciding*. They, or a majority of them, agreed upon some things. They adjourned to meet again. A form of decision, reversing the determination of the commissioners, was prepared by one referee and signed by another, in accordance with the general views of these two, to be presented at the next meeting then appointed for the *decision* of the case. These facts, though they fall short of constituting a final *decision* (and which decision it was

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agreed should be deferred), are stated merely to show that the referees had then, in their own minds, closed the *hearing*, and entered upon that part of their duty which required them to *decide* upon the matter submitted to them upon such hearing. Between these two periods—that is, before the next day of meeting, several inhabitants of the town of Argyle, not parties recognized by the statute as having a right to be heard as parties, procured to be held a meeting of the referees not on an adjourned day, and then made an application to have the *hearing* opened, using arguments and reasons calculated to influence the action of the said referees. This, though perhaps not intended, was a most officious, improper, and meddlesome interference with the rights of parties not present, and with the opinions of a body acting upon their oaths, entrusted with the performance of solemn duties, and with the decision of important interests of the citizens. The courts should never look but with disapprobation upon such direct interference with the actions of bodies upon whom the law has cast the power of disposing of, or affecting the property or interests of others. A justice of this court, or any other, would frown upon any such attempt upon him, and would punish as for contempt any such interference with a jury, and referees, in such a case, are not an exception; and though good faith may have been the moving principle, the precedent is dangerous, and should not be sanctioned or tolerated; and the fact that one of the referees, who before that, at the last regular meeting, had drawn up a written decision of the case had, at the next adjourned meeting, so changed his mind as to agree to deliberate upon the application so improperly made, is far from proving that such interference did not influence the decision. Though the return does not show it. The opinion of the referees may have become known outside; and if applications may be based upon such a state of things, a case is never settled or submitted, though the faith of the parties may be

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pledged to a submission; interested individuals, outside, will not fail to open litigation, so long as either party are informed that weak points may be strengthened; that the testimony of some witness should be impeached; that the weight of evidence against him before the referees must be changed, such motions will be the order, and endless litigation the result; and if upon another hearing the weight is on the other scale, another opening of the case will be applied for; and for the same reason should be, but may not be granted, and this court would possess no power to correct the abuse.

At this period of time, the real question in the case arises. The question of power—the question of necessary adjournments for the *hearing* having once been closed—all the discretion granted to the referees for that purpose, had once been exercised and exhausted, the necessary adjournments for the purpose of *deciding* the case they, doubtless, still possessed; but even that discretion had now come to an end, by this new view of the case, so improperly brought before the referees. Notice of this application of citizens, pending before the referees, was given to the son of the relator, and at a future adjourned meeting this son appeared and requested a withholding of their decision upon said application, to enable him to interpose legal objections, which being granted, he did interpose, to wit: his objections to their entertaining a motion for a further hearing. The objection was overruled by two of the referees, and they then and there entertained a motion upon affidavits, without the previous service of copies thereof, but they then adjourned, to enable the relator to determine whether he would present counter affidavits, and for reasons of convenience to parties, several adjournments were had without any action, and at the next meeting the relator's son again urged his objection to the power of the referees *to open the hearing*, and finally this being overruled, he made affidavits to show that it was not a proper case for the exercise of

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such a power. Replying affidavits were then admitted. All these affidavits are returned with the writ.

By reference to these affidavits, it is seen, that those read in behalf of the commissioners and applicants, for the road, are affidavits impeaching the evidence offered on the *hearing* on the part of the relator, and cumulative evidence on the other side. The referees decided the motion in favor of granting a further hearing. The question now fairly arises, does the power granted by the statute authorize this proceeding by a body known in law as one of inferior and limited jurisdiction? Is the power to *hear* and *decide* such a *motion*, necessarily incident to the power granted?—a power to “adjourn from time to time as shall be necessary.” Is it absolutely necessary to the due administration of justice that they should exercise such power? As no precedent can be found in the books of authority—no rules regulating such a practice, as these officers possess no powers by implication, but like all other inferior and subordinate officers and tribunals that are mere creatures of the statutes, I think they are confined to the powers, *expressly* conferred, or such as are necessarily incident to such conferred power; and, as in all proceedings which may deprive a party of his estate, they are to be held to a strict construction of the statute. I have not been able to see, in the features of this case, that it is one that requires to be made an exception to the general rule, and to those long-established safeguards to property. It is not necessary to say, in deciding this case, that there are *no circumstances* that would authorize such referees to open a case for a rehearing—such as by accident or mistake, one of the parties had been deprived of any hearing whatever, or even of but a partial hearing. It may be that such a power is incident to the power granted, and absolutely essential, to the due administration of justice, as accident and mistake will occur where no human foresight can guard against it; and when fair notice, from the party asking

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the relief, to the other, who was the one in interest, with the grounds upon which it is asked, is furnished. But that is not this case. This case had been heard upon its merits, of the parties who have a right to be heard—and upon the advice of counsel, and the duty of *deciding* had been entered upon by the referees—and then, on account of no accident, or mistake, or default, but because parties not recognized as parties to the proceeding, either because they had heard, or had been informed, or because they suspected, the weight of evidence was against their wishes, ask to have the case opened. For what? To impeach some of the testimony standing in their way, and to add to the weight of evidence on the other side. A court of original jurisdiction would have denied such a motion, if they did not rebuke the application. Such a power as has been here experienced is not within the contemplation of the statutes, and would be a dangerous one to intrust to such a body. There is no case or precedent cited, and I have not been able to find a reported case, where it has been exercised. The powers of referees for the trials of civil causes commenced in the courts, and whose actions and conduct have ever been under the control of the courts; have never, until recently, been extended so far, and being subject to review by the court are not authority for this. The only case that I can find in the books that approaches to this, is that of *Pew agt. Hastings*, (1 Bar. Ch. R. 422,) where it was held, that a surrogate had the power to open a decree taken by default, in consequence of a mistake or accident. But the chancellor, in that case, puts it upon the true ground. He says, "The question is not whether a surrogate who has *heard* and *decided* a case upon the merits, has power to grant a *rehearing*, so as to give one of the parties the benefit of a reargument, or the right to bring forward new evidence to sustain his side of the cause, but whether he has the power to open a decree taken by default, in consequence of a mistake, or accident, by which one of the parties has been

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deprived of any hearing whatever." I think, upon the whole, it is sufficient to say, that in this case, and under the circumstances, the referees exceeded their authority *in hearing this motion*, and in opening the case, and that in opening the *hearing*, the necessary notice of the time and place at which the referees will convene to hear the appeal, as required by the 87th section of the act, (1 *Rev. Stat.*, 518-19) was not given.

The same formalities should be repeated when the rehearing was ordered, as at first. They therefore lost jurisdiction of the case.

I shall not discuss the legal effect of the decision filed, which, on its face, shows only two of the referees to have been present, nor the subsequent act of two of them in filing a supplemental report without consulting or notifying the third.

I think the acts of the referees should be vacated and set aside. That the order appointing the referees should be set aside; and that the appeal stand to be determined by a new board to be appointed.

SUPREME COURT.

MICHAEL KENNEY, plaintiff in error, agt. THE PEOPLE OF THE
STATE OF NEW YORK, defendants in error.

To constitute the crime of *murder*, the *malice* or the *design* need not be proved.

When the act is committed, the *law imputes the design*. It proceeds from the rule that a man is presumed to intend to do what he really does.

Therefore, if a man strikes a blow with a deadly weapon, which necessarily or reasonably results in death, the law will impute to him the design to destroy life; and this, too, whether he be *drunk or sober*.

Neither can the crime of murder be reduced to manslaughter by showing that the perpetrator was *drunk*, when the same offence if committed by a sober man would be murder.

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Brooklyn General Term, December, 1863.
Before LOTT, BROWN, and SCRUGHAM, Justices.
WRIT OF ERROR to the Supreme Court.

C. E. PRATT & WM. L. GILL, *for the plaintiff in error.*
S. D. MORRIS, *for defendants in error.*

By the court, BROWN, Justice. The plaintiff in error, Michael Kenney, was convicted of the crime of murder in the first degree, at the court of oyer and terminer, held for the county of Kings in July, 1863, and the record removed into this court by writ of error. The crime was committed with circumstances of brutality and atrocity almost unexampled. The prisoner is a car driver. On the night of the 21st of April, at eight o'clock, with his wife and two small children, he entered the grocery store of Frederick Mohrmann, at the corner of Fulton and Albany avenues, in the city of Brooklyn, and purchased some groceries for his family use. While there he commenced speaking about some railroad conductor with whom he had had a quarrel about two hours previous. His wife said the conductor was a nice man, and did not want to do him any harm. He told her in an angry tone not to interfere in his business, and be quiet, otherwise he would punch her. He thereupon struck her in the face and kicked her. Mohrmann came from behind the counter and told him to leave the store—that he wanted no fighting, and if he did not stop he would put him out. Kenney said he could not put him out. Mohrmann made the attempt and failed. He thereupon called the witness, Rink, to assist him, and by their joint efforts he was removed from the store to the street, and the door locked, and while this was being done he declared he would kill the Dutch son of a bitch—meaning Mohrmann. The prisoner then threw stones through the windows and doors of the store, and said he wanted his two children. The door was opened by Mohrmann and

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the children put out into the street, and the door closed again. He also threw coal, a coal shovel, a measure, and with a stone of about twenty pounds weight, smashed open the door, and came into the store. Here he took up a saw and a piece of ham and threw them at Mohrmann and struck him with them. The prisoner went again into the street, and the door was again shut against him. He broke the door in once more and came into the store. There was in the store what the witnesses call a meat bench, upon which was lying a large knife. The prisoner seized this knife and struck the bench once, then rushed into the room behind the store, where he met the deceased, John Ravensburg, a person residing with Mohrmann at the time, and with whom the prisoner had no words or controversy, and struck him three blows or thrusts with the knife, two of which entered the chest and the other one the abdomen of the deceased, who died therefrom almost instantly. The prisoner at once became quiet, consulted with his wife where he should go, and as to the best means to escape. She recommended him to go to East Brooklyn, and he left the scene of the murder, going in that direction after telling his wife that if any policeman made inquiry to say he had not been about there that night. The proof leaves little doubt that the prisoner was in a state of intoxication more or less at the time, but otherwise in the full possession of his senses, and quite conscious of what he was doing. There was proof also to show that while sober he was a civil man, but when drunk unusually vicious.

When the evidence was closed the counsel for the prisoner asked the court to charge—

1st. That intoxication does not furnish immunity of crime, but it may be considered in determining what degree of crime has been committed.

2d. That intoxication may be considered in determining whether the homicide was committed by premeditated design.

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3d. If the jury believe that the accused was in a state of mind, from intoxication, that rendered him incapable of premeditation or design, they must find him guilty of manslaughter.

4th. If the jury find the accused was in a state of mind, although caused by the voluntary use of intoxicating liquor, that his judgment was obscured or impaired, so that he was incapable of knowing the degree of violence he was perpetrating, or of properly calculating its effects, they must find for the lesser offence, manslaughter.

The court refused to charge either of the propositions, except so far as the same are embraced in the charge and instructions to the jury (to which I shall presently refer,) and the prisoner's counsel excepted.

The two first propositions are but different modes of expressing the same thought, that the voluntary intoxication of the prisoner at the time of killing, is material to determine whether the homicide of which he is charged is the crime of murder or only the lesser offence of manslaughter. The essential and radical distinction between murder and manslaughter, is the presence of the malice of the common law, or that which is much the same thing, the premeditated design of the statute,—and the proposition of the counsel was, that the jury might infer the absence of malice or premeditated design from the intoxication of the prisoner at the time of killing. To constitute the crime of murder, the malice or the design need not be proved. When the act is committed the law imputes the design. It proceeds upon the sensible rule that a man is presumed to intend to do what he really does, and if he strikes a blow with a deadly weapon, which necessarily or reasonably results in death, the law will impute to him the design to destroy life, and this too, whether he be drunk or sober. As has been well observed, a man under the influence of "voluntary intoxication shall be subject to

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the same rules of conduct, and the same legal inferences, as a sober man."

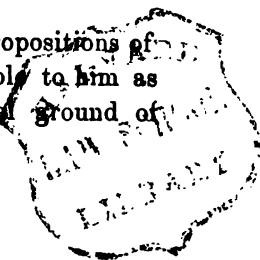
The third and fourth proposition of the prisoner's counsel, which the court was requested to charge, are to the same effect,—that if the jury believed the accused was in a state of mind from intoxication that rendered him incapable of premeditation or design, or that he was in a state of mind from voluntary intoxication which impaired his judgment so that he was incapable of knowing the degree of violence he was using, they must find him guilty of the lesser offence of manslaughter. This would have been saying to the jury that they might infer incapacity to commit the higher grade of crime, and the absence of the knowledge and the discrimination which criminal law imputes to all sane men, from the voluntary intoxication of the prisoner at the time the homicide was effected. The law upon all these subjects is too well, and has been too long settled by adjudicated cases, to need argument or elaboration. (The case of *Rex agt. Carroll*, referred to by Judge DENIO, in the *People agt. Rogers*, (18 *N. Y. Rep.* 9) was in most respects like the present. It was a case of murder by stabbing with provocation, and the court held, that the intoxication of the prisoner was not at all material to be considered. In this same case of *The People agt. Rogers*, the prisoner's counsel requested the court to instruct the jury, "that if they were satisfied that by reason of intoxication there was no intention or motive to commit the crime of murder, they should convict the defendant of manslaughter only. The court of general sessions refused so to charge, and the court of appeals held the refusal to be right, and said: "If by this request the counsel for the defendant meant, as the request seems to have been interpreted by the supreme court, that the jury should be instructed to take into consideration the intoxication of the defendant in determining the intent with which the homicide was committed, the proposition is not law. It

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has never yet been held that the crime of murder can be reduced to manslaughter by showing that the perpetrator was drunk, when the same offence if committed by a sober man would be murder."

The judge in his charge to the jury, and in reference to the request of the prisoner's counsel, said, in substance, that voluntary intoxication furnished no immunity or excuse for crime, and even where intent is a necessary ingredient in the crime charged, so long as the offender is capable of conceiving a design, he will be presumed, in the absence of proof to the contrary, to have intended the natural consequence of his own act,—and when one without provocation kills another with a deadly or dangerous instrument, no degree of intoxication short of that which shows that he was utterly incapable of acting from motive, will shield him from conviction. In the present case the principal question to be determined by the jury, if they found the prisoner guilty of killing the deceased, was whether the crime was murder or manslaughter. To convict of murder it was necessary that the killing should have been perpetrated from a premeditated design to effect the death of the deceased or any human being—it was therefore sufficient to convict if the intention of the prisoner was to kill the storekeeper, although he may not have intended to kill the deceased. If that intention existed, although it was conceived and formed immediately before the fatal act was committed, the offence was murder. If on the other hand the act was committed without a design to effect death, in the heat of passion, then the crime would be reduced to manslaughter."

These instructions to the jury, upon the propositions of the prisoner's counsel were quite as favorable to him as the law would allow, and afforded no legal ground of objection.



Monroe agt. Monroe.

SUPREME COURT.

MARY L. MONROE, administratrix, and HENRY C. THELEMAN, administrator, &c., of HENRY MONROE, deceased, respondents agt. ERASTUS MONROE, appellant.

By the amendment to the Code in 1862, *county courts* are authorized to try certain actions by a jury that are brought into these courts by appeal from justices' courts, to wit: When the amount of the claim or claims of either party litigated in the court below shall exceed \$50; or when in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered shall exceed \$50, exclusive of costs. And 1. When the judgment was rendered upon an issue of law joined between the parties. 2. When it was rendered upon an issue of fact joined between the parties whether the defendant was present at the trial or not.

The county court (by the judiciary act of 1847) has the same power as the late court of common pleas had to incorporate a bill of exceptions or a case and exceptions into a judgment roll, in an action brought into that court by appeal from a justice's court. And the supreme court, on appeal from such judgment of the county court, can review any errors brought up by the record, including those, of course, which are contained in the case or exceptions.

Broome General Term.

Argued January Term, 1864.

Decided July Term, 1864.

Present, CAMPBELL, PARKER, MASON, and BALCOM, Justices.

MOTION by respondents to dismiss the appeal from the judgment of the Broome county court.

The plaintiffs recovered a judgment in a justice's court against the defendant in October, 1862, for \$175.75. The defendant appealed therefrom to the Broome county court, where a new trial was had before a jury, and a verdict was rendered in favor of the plaintiffs—on which verdict judgment was rendered against the defendant for \$235.60 damages besides the costs.

The defendant took exceptions on the trial in the county court, which were settled and inserted in a case, and made a part of the judgment roll in that court.

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The defendant did not move for a new trial on the case and exceptions in the county court, but appealed from the judgment of that court to this court.

The plaintiffs moved this court for a dismissal of the appeal.

McDOWELL & EDWARDS, for plaintiffs.

SOLOMON JUDD, for defendant.

By the court, BALCOM, J. Prior to the constitution of 1846, a defeated party to an action tried by a jury in a court of common pleas, whether the same was commenced in that court or brought there by appeal from a justice's court, could move in the former court for a new trial on a case or bill of exceptions (2 R. S. 208, § 1 Sub. 2.) And he could, in the first place, have his bill of exceptions made part of the judgment record, without moving for a new trial in the common pleas, and then remove the record into the supreme court by writ of error, and there ask for a reversal of the judgment and a new trial upon the exceptions. This was permitted, notwithstanding power was expressly conferred on courts of common pleas to grant new trials. (2 R. S. 208, § 1, Sub. 2.) And I need not cite authorities to show this; for the practice must be remembered by every lawyer who was at the bar as early as 1846.

The bill of exceptions was made a part of the record in the common pleas, although the statutes respecting the records of that court were silent on the subject. (See 2 R. S. 210, § 15, § 16.)

The judiciary act of 1847 conferred the same powers on county courts to try actions brought into that court by appeal from justices' courts, and also certain other actions, and to grant new trials, that were theretofore possessed by courts of common pleas. (*Laws of 1847, Vol. 1, p. 328, § 29, § 30.*)

The court of appeals subsequently held that the legisla-

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ture had no authority, under the constitution of 1846, to confer jurisdiction on county courts to try common law actions that did not originate in a court of a justice of the peace. (*Griswold agt. Sheldon*, 4 *Comstock*, 580; *Kundolf agt. Thalheimer*, 2 *Kernan*, 593.) And the right to try actions before a jury in county courts, though brought there by appeal from justices' courts, was taken away by the Code of 1848. (*Laws of 1848*, p. 503, § 32, § 33.) And by the Code (until the year 1862), notwithstanding the many amendments of it, all causes that originated in justices' courts were heard in county courts by the county judge without jury, upon the evidence taken before the justice.

But the Code was so amended in 1862, and again in 1863, as to authorize county courts to try certain actions by a jury that were brought into those courts by appeal from justices' courts. (*Laws of 1862*, chap. 460; *Laws of 1863*, chap. 392.)

When those amendments were made, the section, respecting the judgment roll in county courts in actions originating in justices' courts, was as follows: "To every judgment upon an appeal, there shall be annexed the return on which it was heard, which shall be filed with the clerk of the court, and shall constitute the judgment roll." (*Code*, § 367.) And it is now argued that the county court is not authorized to make a case and exceptions, or bill of exceptions, a part of the judgment roll, in any cause originating in a justice's court; and that, therefore, this court cannot review the judgment of a county court in such a cause, upon exceptions taken on the trial thereof, in the county court, though incorporated into the judgment roll by that court. The argument is, that the exceptions are improperly in the roll, and that, therefore, this court cannot rightfully examine them.

This reasoning is unsound. The verdict of the jury in such causes must certainly be made a part of the judgment

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roll, though it is not required to be inserted in it by any provision of the Code. But all difficulty on this subject is obviated by section 36 of the judiciary act of 1847. (*Laws of 1847 Vol. 1, p. 330,*) which confers the same powers and jurisdiction upon county courts in all matters, suits, and proceedings, that were possessed at or before the passage of that act, by the courts of common pleas of the same county, so far as is consistent with the constitution of 1846, and statutes enacted since that year, and also makes all laws relating to said courts of common pleas, the jurisdiction, powers and duties thereof, the proceedings therein, and the officers thereof, and their powers and duties, applicable to the county courts, their powers and duties, the proceedings therein and the officers thereof, and their powers and duties, so far as is consistent with said constitution and statutes passed since 1846.

The incorporation of a bill of exceptions, or case and exceptions, into a judgment roll of a county court, in an action brought into that court by appeal from a justice's court, is certainly consistent with the constitution of 1846, and the Code as it now is. Hence the case and exceptions, or bill of exceptions, in this case was properly made a part of the judgment roll by the county court.

An appeal may be taken to this court from the judgment rendered by a county court. (*Code, § 344.*) And the rule now is as it was before the Code, that a judgment of an inferior court may be reversed by an appellate court for any error appearing by the record, showing that the trial was not fair or legal towards the appellant, or that the judgment should have been in his favor, or more favorable to him.

The judiciary act of 1847 confers the same powers on this court that were possessed by the supreme court, prior to the adoption of the constitution of 1846, so far as is consistent with that constitution and laws passed since it became in force. Hence this court has power and jurisdic-

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diction to review the judgment of the county court in this case.

For these reasons I am of the opinion the motion to dismiss the appeal in the case should be denied.

Decision accordingly.

NEW YORK SUPERIOR COURT.

GEORGE BOWMAN agt. WILLIAM M. TALLMAN.

It is a well settled elementary principle of law, that the party employing an *attorney or counsellor at law* to perform any service in his professional capacity, in the absence of a special agreement to the contrary, is *personally responsible* for any such services rendered.

The general rule is, that the party employed looks to the employer for payment; and when a trustee or guardian employs an agent or attorney in the execution of his trust, such agent or attorney must look to the person employing him, *individually*, for his payment, and can have no claim on the *trust fund*.

Where the defendant was the general agent of the property of an estate, and acted for all the heirs, and had previously been a client of the plaintiff who was an attorney and counsellor at law, and employed the plaintiff to do business for the infants and non-resident heirs, who were irresponsible parties, without suggesting or agreeing not to become individually responsible for the same; or without notifying the plaintiff he would not be responsible; and this, taken together with the fact that defendant controlled the entire business, funds, and all the other concerns of the estate, was sufficient to establish his *personal responsibility* to plaintiff for his services claimed.

Where the plaintiff, an attorney and counsellor at law, was employed by the defendant, an agent of all the heirs to an estate, to take such proceedings as the plaintiff should deem proper for the payment and extinguishment of a heavy assessment upon their real estate; and after an examination of the will of the testator in reference to the property, he advised that it be *sold under the statute* for the benefit of the infants, who, under the provisions of the will, were entitled to the property in fee, after the extinguishment of certain life estates; and such proceedings were thereupon instituted and a sale thereunder made, but which proved ineffectual to convey a valid title to the purchaser, inasmuch as the special and general terms of the supreme court denied a motion to compel the purchaser to take the title, on the ground that such sale did not cut off or affect the rights or interests of *unborn children*, who might be eventually entitled, under the provisions of the will, to an interest in the real estate in question:

Held, that the plaintiff was entitled to *compensation for his services* in such proceedings and sale, notwithstanding that after such decision of the supreme court he abandoned the proceedings, and commenced proceedings in *partition*, which

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resulted in procuring a sale and the confirmation thereunder of the title to the property in the purchaser.

There is no *implied agreement* in the relation of counsel and client, or in the employment of the former by the latter, that the former will guaranty the success of his proceedings in a suit, or the soundness of his opinions, or that they will be ultimately sustained by the court of last resort.

But it *seems* that in this case the plaintiff was right in advising the proceedings first undertaken to sell the property under the statute. The statute was intended to furnish a cheap and prompt mode of selling infants' estates, where such sale is necessary. If the statute does not apply in such a case, it fails of its object, in a case calling most pressing for its action.

Infants unborn are not seized, hence courts cannot sell their interests, because such interests do not exist; they can sell only interests existing. If a child should be born, it will be vested with the interest in the *share substituted for real estate* and held by its co-heirs. (ROBERTSON *J. dissenting.*)*

New York General Term, June, 1864.

Before ROBERTSON, Ch. J., BARBOUR and McCUNN, Justices.

THIS was an action brought by the plaintiff against the defendant to recover the sum of \$1,341.18, with interest thereon from the 20th day of May, 1863, for professional services as a lawyer.

The first count in the complaint claimed that on or about the 1st of November, 1859, the plaintiff was retained by the defendant to institute and prosecute proceedings under the statute for the sale of the interests of certain infants in certain real estate in the city of New York, wherein Mary E. Conover and Emily L. Conover, by Garret S. Conover, their next friend; Cordelia L. Conover, Elizabeth Tallman, widow, &c., Charles E. Williams, Daniel Williams, and Mary D. Williams, by Thomas T. Williams, their next friend; William H. Bennett and Eveline Bennett, James T.

*NOTE.—We have reported this case very fully, including the pleadings, evidence, briefs, trial, decision, and opinions; and we make no apology for the space occupied in so doing, as we consider it a case of much importance on the principal question involved to every member of the legal profession personally, besides involving another question which is very important, to wit: Whether there is any substantial difference between an application for a sale under the statute and a sale in partition to bind after born children? That is, if the interests of children in existence and unborn children attach to the *fund in court as real estate* on a sale in partition: Why do not the same interests attach to the fund in court on a sale under the statute, where all the parties in existence are before the court and are represented in the proceedings?—R.R.P.

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Lewis, and George Lewis, by Charles Lewis, their next friend; Emily N. Lewis and Mary E. Vanderveer, by Abraham S. Vanderveer, her next friend, became petitioners; that the plaintiff, in pursuance of such retainer, did institute, prosecute and conduct well and faithfully such proceedings from about the said 1st of November, 1859, to on or about the 15th of January, 1861, as attorney and counsel, for which he claimed for such services and disbursements \$956.06. The second count claimed, that on or about the 10th of September, 1860, the plaintiff was employed, retained and directed by the defendant to appear for the defendant in an action brought against him in the supreme court by one Henry Wilson as plaintiff, and defend said action; that the plaintiff did appear in and defend said action, and procured the termination thereof; for the work, labor and services earned therein as attorney and counsel, the plaintiff claimed to recover \$150. The third count claimed, that on or about the 1st day of February, 1861, the plaintiff was employed and retained by the defendant to bring, prosecute and carry on and conduct an action of partition in the supreme court, wherein Cordelia L. Conover was plaintiff, and Martha S. Bennett and Harmon L. Bennett, her husband, Charles E. Williams, Daniel Williams, Mary D. Williams, William H. Bennett, Eveline Bennett, Martha S. Bennett, 2d, Emily N. Lewis, and Charles Lewis, her husband, James S. Lewis, George Lewis, Adeline A. Lewis, Garret S. Conover, Mary E. Conover, Emily L. Conover, Mary E. Vanderveer, Elizabeth Tallman, William M. Tallman, and Henry H. Tallman, were original defendants, and Charles H. Conover became a defendant by the first supplemental complaint on or about October 3, 1861, and Charles Lewis, Jr., became a defendant by second supplemental complaint on or about November 7, 1862, for the partition or sale of certain real estate situate in the city of New York. That the plaintiff did accordingly thereupon, upon the retainer aforesaid, bring, prosecute,

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carry on and conduct such suit on the original and said first and second supplemental complaints, from about the 1st of February, 1861, to on or about the 16th day of May, 1863, as attorney and counsel, for which he claimed for such services and necessary disbursements \$1,533.42. The fourth count claims, that the plaintiff, as attorney and counsel of the said defendant, and at his request did, between the 15th day of July, 1859, and the 20th day of May, 1863, render other services, work, labor, care and diligence, skill, attention and attendance, counsel and advice, in and about the business of the said defendant, at his request, and did earn divers fees and sums of money therefor, and had many and long consultations with said defendant, at his request, in and about said business, for which he claimed \$150. That for, and by reason of the several causes of action hereinbefore set forth, there was due and unpaid to the plaintiff from the defendant, after deducting and allowing all payments and off-sets, the sum of \$1,341.18.

The amended answer of the defendant averred that the plaintiff being an attorney and counsellor at law, was on or about the 15th of July, 1859, retained and employed by and in behalf of the owners of certain real estate, at the southeast corner of Whitehall street and Bridge street, in the city of New York, in some lawful manner, and by appropriate legal proceedings to procure the sale of said real estate; that the then owners of said real estate were:

1. Elizabeth Tallman, who was seized of one-third part thereof during her widowhood.
2. Cordelia L. Conover, who was vested with a life estate in one-quarter thereof, subject to the said right of the said Elizabeth Tallman.
3. Mary Elizabeth Conover and Emily M. Conover, infants, and children of the said Cordelia, who were each vested in fee, with one-half of said quarter part of the said Cordelia, subject to the said right of the said Elizabeth Tallman, and also to the said life estate of their mother, and subject also to become opened, and to let in any child or

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children afterwards born to the said Cordelia, equally with the said Mary E. and Emily N. 4. Martha S. Bennett, who was vested with a life estate in one-quarter part thereof, subject to the said right of the said Elizabeth Tallman. 5. Charles E. Williams, Daniel Williams, Mary D. Williams, William H. Bennett, and Eveline Bennett, infants, and children of the said Martha S. Bennett, each vested with one-fifth part of the said quarter part of the said Martha S. Bennett, in fee, subject to the said right of the said Elizabeth Tallman. Also, to the life estate of their said mother, Martha S. Bennett, and also subject to be opened, and let in any after-born child or children to the said Martha S. Bennett, equally with the said Charles, Daniel, Mary, William and Eveline. 6. Emily N. Lewis, who was vested with a life estate in one-quarter part thereof, subject to the said right of the said Elizabeth Tallman. 7. John T. Lewis and George Lewis, infants and children of the said Emily N. Lewis, each vested in fee, with one-half of said quarter part of said Emily N., subject, nevertheless, to the said right of the said Elizabeth Tallman. Also, to the life estate of their said mother, Emily N. Lewis, and subject also to be opened and to let in child or children thereafter to be born to the said Emily N. Lewis, equally with the said John T. and George. 8. Mary Elizabeth Vanderveer, vested in fee simple, absolute, with one undivided quarter part of the said real estate, subject to the said right of the said Elizabeth Tallman. That this defendant had no title or interest in said real estate, and in such retainer and employment acted solely and only as the agent of the said owners, and so at the time made known to the plaintiff. And it was then and there understood that the said plaintiff would obtain compensation for his services in such retainer and employment out of the proceeds of the sale of said real estate.

That the said plaintiff was at such retainer and employment fully informed of all the facts and circumstances as

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to the title and situation of said real estate, and the rights and interests of all persons entitled and interested in said real estate.

That on such retainer and employment the said plaintiff first instituted the proceedings alleged for the first cause of action set forth in the complaint, and obtained the appointment of this defendant as special guardian of all the said infants, and in all action and acts of this defendant, in and in relation to said proceedings, at the time and subsequent to his appointment as such special guardian, he acted as such special guardian; and as such, on the twentieth day of February, 1860, advanced to said plaintiff the sum of twenty-five dollars for the fees of Charles P. Kirkland, Esq., the referee in such proceedings.

That on the twenty-fourth day of February, 1860, an order in such proceedings, for the sale of said infants' estates and interests in said real estate, by this defendant as their special guardian, was obtained; and thereupon, in conjunction with the adult owners in such real estate, this defendant, as such special guardian, did contract to sell the said real estate to one Henry Wintjen, and on such contract of sale received one thousand four hundred dollars, being ten per cent of the purchase money, agreed to be paid by the said Henry Wintjen therefor. And on the fourth day of April, 1860, this defendant, at the request of the said George Bowman, plaintiff in this action, advanced to him one hundred dollars thereof, and which sum of one hundred dollars has not been returned by the said George Bowman.

That thereafter, and on or about the seventeenth day of April, 1860, deeds by the adult owners of their estates and interests in said real estate, and also by this defendant, as special guardian of said infant owners, to the said Henry Wintjen, under and in pursuance of the said order, were duly executed and acknowledged, and ready to be delivered to the said Henry Wintjen, but the said Henry

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Wintjen refused to consummate his contract and complete the said purchase, on the ground that the said proceedings were not lawful and proper, and the said order was invalid, and not effectual to convey to the purchaser thereunder the entire fee simple absolute of said real estate.

That thereupon, under the advice of the said plaintiff, and finding that the sale of the said real estate might be contracted for at an increased price, this defendant repaid to the said Henry Wintjen the said sum of one thousand four hundred dollars; and, subject to the approval of the court, in conjunction with the adult owners in said real estate, as such special guardian of said infants, on or about the sixth day of May, 1860, made another contract for the sale thereof with one Henry Wilson, and on the making of such contract received from the said Wilson the sum of seventeen hundred dollars, which, with the further sum of three hundred dollars on the day previous paid by the said Henry Wilson to the said George Bowman, plaintiff in this action, made up the sum of two thousand dollars, by the terms of the contract to be paid by said Wilson on the execution and delivery thereof.

That said last-mentioned contract of sale was duly approved by the supreme court, and deeds by the adult owners in said real estate, and also by this defendant as special guardian of said infants as aforesaid, to the said Henry Wilson, were duly executed and acknowledged, ready for delivery to the said Henry Wilson, purporting to convey to him the entire estate and possession of said real estate in fee simple; whereupon the said Henry Wilson refused to accept the same and consummate his said purchase, and thereupon a motion in the said proceedings was made by the said George Bowman, plaintiff in this action, that the said Henry Wilson be ordered to consummate or complete his said purchase, which motion resulted in a denial thereof by the court, on the ground that the court had "no power by a sale under the provisions of the statute

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in relation to the conveyance of lands by infants, and the sale and disposition of their estates (3 *Rev. Stat.*, 5 *Ed.*, pp. 275 and 276), to cut off or affect the rights or interests of parties not in existence, but who may be eventually entitled to an interest in the real estate in question."

That under and by reason of the advice and direction of the said George Bowman, plaintiff in this action, this defendant did not immediately upon such decision repay to said Wilson the said sum of two thousand dollars, so by him, said Wilson, paid on the said contract as aforesaid, and an action therefor was commenced by the said Henry Wilson against this defendant, and the defence thereof was by this defendant committed to the said George Bowman, plaintiff in this action, who afterwards arranged for the settlement thereof, on the terms that the said Henry Wilson should be repaid the said sum of two thousand dollars, and interest thereon from the date of payment thereof, and be released from his said contract. And this defendant was thereupon forced to repay and did repay to the said Henry Wilson the whole of the said sum of two thousand dollars and interest, amounting to two thousand and ninety-five dollars and twenty-five cents—the said George Bowman, plaintiff in this action, retaining and neglecting to repay the said sum of three hundred dollars and interest thereon, so by him received from said Wilson as aforesaid.

That afterwards, and in or about the month of February, 1861, the said George Bowman, plaintiff in this action, on the same retainer and employment hereinbefore specified, instituted the action and proceedings in the complaint set forth as the third alleged cause of action, and previously to the sixteenth day of April, 1862, had procured the appointment of this defendant as guardian *ad litem* of the then infant defendants in said action, viz: Charles E. Williams, Daniel Williams, Mary D. Williams, William H. Bennett, Eveline Bennett, Martha S. Bennett, 2d, James T. Lewis, George Lewis, Mary E. Conover, and Charles H.

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Conover; and as such guardian *ad litem*, this defendant, at the request of said George Bowman, plaintiff in this action, on the said sixteenth day of April, 1862, advanced to him the sum of twenty-five dollars for the fees of John T. Hoffman, Esq., referee, on a reference in said action. That such proceedings were afterwards had in said action, that on the 16th day of February, 1863, a judgment and decree was made therein—of which a copy is annexed to this amended answer, and which the defendant asks may be taken as part of this his amended answer—that John T. Hoffman, Esq., the referee therein named, did thereafter make sale of the said real estate, under and in pursuance and in accordance with said judgment, and made report thereof to the said court. And the said court, on the twenty-fourth day of April, 1863, confirmed the said sale; that the purchaser at said sale completed the same, and paid in full the purchase money thereof; and the said referee thereupon paid out of the same the taxes and assessments, and to the plaintiff in this action his costs and disbursements, including the said last-mentioned sum of twenty-five dollars, by this defendant advanced to the said George Bowman, plaintiff in this action, and also the other costs and disbursements, together with the referee's fees on such sale, in the said judgment directed. And on the fourth day of May, 1863, paid over the balance, amounting to the sum of fifteen thousand and sixty-three dollars and seventy one cents (15,063.71), to this defendant to be held and disposed of and invested by this defendant, under and in pursuance of the provisions and directions of the said judgment and decree.

And for further answer to the complaint, this defendant saith, that as to the alleged particular services and disbursements of the plaintiff mentioned in the complaint, in and about the proceedings and actions stated in the first, second and third alleged causes of action set forth in the complaint, he hath not knowledge nor information sufficient

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to form a belief whether the allegations of the complaint in those respects are true, except in so far and in the respects hereinbefore stated.

And as to all the allegations of the complaint, except as herinbefore admitted or denied, the defendant for answer thereto, denies the same and each and every thereof. And he denies that he owes the plaintiff the several sums of money demanded in the complaint, or any or either of them, or any other sum or sums of money.

And this defendant respectfully submits :

Firstly. That he is not personally liable for the alleged causes of action, firstly, secondly and thirdly set forth in the complaint.

Secondly. If this defendant shall be held personally liable, the plaintiff is not entitled to recover for services and disbursements in the nugatory and useless proceedings set forth in the first cause of action, alleged in the complaint ; nor for the services and counsel fees set forth for the second cause of action alleged in the complaint.

Thirdly. By way of counter claim, that this defendant is entitled to recover of and from the said plaintiff, the said sum of three hundred dollars, paid to the plaintiff by the said Henry Wilson as aforesaid, and retained by the plaintiff, with interest from the date of payment thereof, viz. : the fifth day of May, 1860 ; also the said sum of one hundred dollars, part of the money paid to this defendant as special guardian of said infants, by the said Henry Wintjen, and by this defendant, as such special guardian, advanced to the plaintiff as aforesaid, with interest from the date of advancement thereof, as aforesaid, viz. : the fourth day of April, 1860 ; also, the said sum of twenty-five dollars, so as aforesaid advanced by this defendant, as special guardian of said infant petitioners, to the said plaintiff, on the twentieth day of February, 1860, with interest from the date of advancement thereof ; also, the further sum of twenty-five dollars advanced to the said plaintiff by this

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defendant, on the sixteenth day of April, 1862, with interest from the date of advancement thereof. And for which said several sums of money, with the interest thereon, respectively as aforesaid, this defendant asks judgment.

The reply of the plaintiff to the amended answer of the defendant, stated: that each and every of the sums of money referred to in the said answer, "by way of counter claim," were paid to the plaintiff or to third parties, either in discharge of claims not embraced in the complaint, and which were thereby settled, or in satisfaction of so much of the costs, counsel fees, and disbursements earned and incurred in the matters and proceedings set forth in the complaint, leaving such balance owing the plaintiff, as is claimed in the said complaint, and for which the plaintiff, as before claimed judgment. The issues thus joined came on to be tried before Mr. Justice MONELL and a jury on the 17th day of Feb., 1864. The plaintiff, Mr. Bowman, was called as a witness on the part of the plaintiff, and testified that he was an attorney and counsellor at law, practicing at the New York bar, and had been for nearly thirty years—always in the city—had been acquainted with the defendant nearly all that time—had acted as attorney for him in all the business he had known of the defendant's having for a number of years—say six or eight years previous to 1859. In July, 1859, the defendant first spoke to him respecting there being a heavy assessment upon the property at the corner of Whitehall and Bridge streets—defendant said it was property which came from his father, and he was executor under his father's will—he produced a copy of the will, which plaintiff examined, and also ascertained the facts in regard to the assessment—plaintiff advised him about the situation in that respect, and the necessity of some means being taken to pay it, to save the property from being sold by corporation sale. After numerous interviews on the subject, defendant wished him to see if there could not be authority obtained for defendant to mortgage the

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property to raise means to pay the assessment, as there was no means independent of the property, and the income by rental was not sufficient (the assessment being over \$1600)—plaintiff examined and reported to him against the practicability of obtaining funds by mortgage. Plaintiff then informed defendant that either one of two courses could be taken—to institute a partition suit, or apply for a sale under the statute; that the proceedings under the statute promised to be the cheapest and shortest; the suit in partition, he suggested, would be the safest and freest from objection; but in view of all the parties giving assent to the proceedings, and no opposition anticipated, it seemed unreasonable to invoke a partition suit, and incur a good deal more expense. The defendant being desirous of saving as much expense as possible, they concluded to bring the matter forward on a petition for a sale under a statutory proceeding. The defendant, by order of the court, was appointed special guardian of the infants for the purpose of that proceeding, and it was referred to Charles P. Kirkland, Esq., to ascertain the truth of the facts stated in the petition, and whether a sale of the premises, or any or what part thereof, would be beneficial to the infants, and the particular reasons therefor, and to ascertain the value of the premises, &c. The defendant attended on the reference before Mr. Kirkland, with the plaintiff, and when the report was made the defendant paid to plaintiff the amount of the referee's fees, \$25. The referee reported the facts which had been proved before him with regard to the situation of the property, the condition of the infants and parties interested, the want of other means to pay the assessment, and recommending that the property should be sold. At the commencement of the proceedings the property was valued at \$12,000 by the defendant. The defendant thereafter made a contract for the sale of the property to a Mr. Wintjen, for \$14,000—deeds were prepared for all the parties to sign, but under the advice of counsel respecting the va-

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lidity of the title, Wintjen finally declined to consummate the bargain. Plaintiff was about to proceed against Wintjen to compel him to fulfil, when another purchaser, Mr. Wilson, was found who would give \$500 more. A contract was made with Wilson, subject to the approbation of the court, which was drawn and executed. After the matter had been under examination by the counsel for Mr. Wilson for several weeks, the result was a final conclusion not to fulfil the contract, on the ground that there were children of three daughters mentioned in the will, liable to be born from time to time, and that the sale could not operate to cut off their future claim to title in the property; that although the property was sold, yet the infants then unborn, but thereafter to be born, might set up a claim to the property. Plaintiff and defendant then concluded to move the court to compel Mr. Wilson to take the title and complete his purchase. Plaintiff at all times communicated to the defendant that he had thoroughly examined the subject, and had great confidence that Mr. Wilson would have to take the property under the order of the court. The papers were prepared, and the motion was made in the supreme court before Judge SUTHERLAND—he took the papers, and subsequently, Aug. 10, 1860, denied the motion with costs—giving the following opinion :

SUTHERLAND, J. The motion made in this matter, that Henry Wilson be ordered to consummate or complete his purchase of certain real estate, must be denied, with ten dollars costs.

In my opinion, the court has no power by a sale under the provisions of the statute, in relation to the conveyance of lands by infants, and the sale and disposition of their estates, (3 *Rev. Stat.*, 5th *Ed.*, 275, 276,) to cut off or affect the rights or interest of parties not in existence, but who may be eventually entitled under the provisions of the will of Mr. Tallman, Jr., to an interest in the real estate in question. I find no case in which it has ever been held,

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that the late court of chancery had, or that this court has this power. In *Cochran* agt. *Van Surlay*, (20 *Wend.*, 374, 375,) the chancellor expressed the opinion that he had not this power; and Judge Bronson, in *Baker* agt. *Lorillard*, (4 *Comst.*, 270,) expressed a similar opinion.

It is plain from the provisions of the statute, that it never was intended to authorize a sale of the interests or estates of infants not in existence. Section 106 (176) expressly declares that no real estate shall be sold in any manner against the provisions of any last will, by which such estate was devised to an infant. I think this section prohibits the sale of the future contingent interests of unborn infants in this case; and independent of this section, I do not believe the court, under the statute has the power.

The question is not here, as it has been in several cases, whether the legislature has the constitutional power to authorize, by special law, the sale and conveyance of such future interests, but the question is, whether the legislature has conferred such power on the court by these provisions of the revised statutes. It is clear to me that it has not; outside of these provisions of the revised statutes the court has no power. (*Rogers* agt. *Dill*, 6 *Hill*, 415. *Baker* agt. *Lorillard*, 4 *Comst.*, 266).

The case of *Mead* agt. *Mitchell*, (3 *Smith*, 17 *N. Y.*, 214), was a partition suit. In *Legget* agt. *Hunter*, (19 *N. Y.*, 447), there was an express power to sell given to the executors, and a special act of the legislature.

Plaintiff communicated Judge SUTHERLAND's views to defendant, and recommended an appeal to the general term—defendant concurred, and an appeal was brought, and the case finally directed by the court to be submitted on written points. Judge Edmonds appeared on the other side, and prepared an argument for the adverse party, and he (plaintiff) prepared an answering argument, and the case was submitted to the general term in the latter part of

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Nov. or Dec. 1860. The general term affirmed the judgment at special term, without delivering an opinion. The following points were submitted to the general term :

First District, General Term.

IN THE MATTER OF THE APPLICATION OF
MARY E. CONOVER AND OTHERS,
appellants,
and
HENRY WILSON, respondent.

Appellants' Points.

This is an appeal from an order of special term, denying an application by the special guardian of the infant petitioners, for the confirmation and consummation of a contract for the sale of the interest of the said infants in certain real estate, made by the special guardian, with the respondent, Henry Wilson.

The following facts have been found by the court, viz. : That William Tallman, Jr., who died January 24th, 1849, seized "of the house and lot, corner of Whitehall and Bridge streets, in the city of New York," devised the same by his will duly proved and recorded, to his four daughters, equally, for their respective lives, with the remainder thereof in fee to their children (the infant petitioners), or in case of the death of either or any of the said daughters without issue, then the share or shares of such daughter or daughters so dying, to go to the testator's remaining children equally, subject to a charge thereon, payable to the testator's widow during her life, and to certain bequests to three of the testator's daughters. That all the four daughters of the testator married and had lawful issue, now living, being the infant petitioners. That one of the daughters has deceased, leaving issue now living, Mary E. Vanderveer, who is one of the infant petitioners. That the three other daughters and the widow of the testator are now living. That all the bequests to the three daugh-

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ters have been paid. That the premises are worth not less than \$12,000, and are now liable to be sold at any moment by the corporation of the city of New York, for the payment of an assessment of \$1,636, due March 26th, 1859, and interest thereon, for widening and straightening Whitehall street. That by such a sale the interests of said infants in said premises would be materially prejudiced, if not entirely lost and destroyed. And that none of the said infants have any means, other than the property itself, by which to discharge this incumbrance. That all living persons having interests in the property join in this application, and are ready to execute deeds to the purchaser.

Points.—The respondent objects to consummating his purchase on the ground that children may be hereafter born to one or more of the three daughters of the testator, who would be entitled to interests in the premises, and would not be bound by the decree of the court.

In reply the petitioners insist that the court can give the purchaser a perfect title.

I. There is a clear title in the petitioners. (*a*, *Seizin of testator*, fol. 93; *b*, *devise to petitioners*, fols. 93-5; *c*, *legitimacy of petitioners*, fols. 95-7; *d*, *payment of the legacies*, fol. 94.)

II. The legislature has delegated its own inherent control over the legal estates of infants to this court. (*Laws of 1814*, pp. 128-9; *Laws of 1815*, pp. 103-4; *Rev. Stat. 5th ed. vol. 3*, pp. 275-6; *Cochran agt. Van Surlay*, 20 *Wend.* 375-6; *Rogers agt. Dill*, 6 *Hill*, 415; *In Re Whittaker*, 4 *Johns. Ch. R.* 378; *Forman agt. Marsh*, 1 *Kern.* 544; *Leggett agt. Hunter*, 19 *N. Y. Rep.*, 445, 463.) In *Cochran agt. Van Surlay* (20 *Wend.* at p. 373), Chancellor WALWORTH says: "It is clearly within the power of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition and management of the property and effects of infants, lunatics and other persons who are incapable of managing their own affairs

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And BRONSON, J., in the same case below (15 *Wend.* 443), says: "It cannot be doubted that the children, had they been capable of acting for themselves, would readily have consented to this law; and if the power of controlling the estate of infants for just and equitable purposes had previously been conferred on the courts, it can hardly be questioned that an order for such a sale and investment as was authorized by the legislature in this case, would have been made without the least hesitation. The necessity for legislation concerning this estate, probably suggested the general provision which was subsequently made at the same session, by the act concerning infants (*Laws* 1814, p. 116, *chap.* 108)."

III. The jurisdictional requirement of the statute is satisfied.

1. By section 170, "any infant seized of any real estate may apply for the sale, or disposition of his property."

(a) The infant petitioner, Mary E. Vanderveer, is seized of one fourth part of the property in fee.

(b) The other infant petitioners are seized of the whole of the remainder in the other three-fourths of the property. (2 *Saund.* 235; 4 *Kent's Com.* 386, 202; *Cook* agt. *Hammond*, 4 *Mason*, 489; *Wimple* agt. *Fonda*, 2 *J. R.* 288; *Vanderheyden* agt. *Crandall*, 2 *Denio*, 1, 21-23; *Baker* agt. *Lorillard*, 4 *Comst.* 257; *Giffard* agt. *Hart*, 1 *Sch. & Lef.* 409; *Hannan* agt. *Osborn*, 4 *Paige*, 336; *Nodine* agt. *Greenfield*, 7 *Paige*, 544.)

(b) 3. The cases rest upon principles which are submitted to be equally applicable to this proceeding as to partition.

(b) 4. Had any difference on this point, between these proceedings and partition existed, it would have been suggested in the text books. The contrary is the fact (2 *Hoff. Ch. Pr.* 210).

(b) 5. All the substantial elements of a partition suit have been involved in this proceeding. As far back as 1818, the inquiry as to the divisibility of the property was

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referred to a referee (2 *Hoff. Ch. Pr.* 96, *in note*). And a petition was a good commencement of a partition suit. (*Larkin agt. Mann*, 2 *Paige*, 27; 3 *R. S. 5th ed. p.* 617, § 93, [79.])

(b) 6. The statutes relative to partition do not seem to be as clear in cutting off this objection as that relative to this proceeding. (3 *R. S. 5th ed. p.* 605, § 10; and *Id. p.* 610, § 44; 2 *Hoff. Ch. Pr.* 161, *note* 4.)

(b) 7. The necessity for partition if it exists, proves a plain defect in the law. The grounds for sale in partition would be the same as here.

(b) 8. The judgment of sale will protect the purchaser. (VERPLANCK, *Senator*, in *Cochran agt. Van Surlay*, 20 *Wend.* 386; *Jackson agt. Edwards*, 7 *Paige*, 397; *Bennett agt. Hamilton*, 2 *Johns.* 566, 567; *Loyd agt. Johnes*, 9 *Ves.* 65; *Curtis agt. Price*, 12 *Ves.* 89; *Rev. Stat. 5th ed. vol. 3, p.* 11, § 13; 2 *Bl. Comm.* 163-9; *Right agt. Kreber*, 5 *B. & Cr.* 392; *Doe agt. Perryn*, 3 *T. R.* 484; *Sisson agt. Seabury*, 1 *Sumner*, 243; *Dingley agt. Dingley*, 5 *Mass.* 535; *Anable agt. Patch*, 3 *Pick.* 360; *Hall agt. Tuffts*, 18 *Pick.* 458; *Yeaton agt. Roberts*, 8 *Foster*, 459; *Van Vechten agt. Pearson*, 5 *Paige*, 512; *McComb agt. Miller*, 9 *Paige*, 265, 268; *S. C.* 26 *Wend.* 229, 236-7; *Doe agt. Provost*, 4 *J. R.* 61; *Tanner agt. Livingston*, 12 *Wend.* 83, 93.)

(b) 1. And these remainders, being actual estates in these petitioners, are capable of a present disposition by them. (*Rev Stat. 5th ed. vol. 3, p.* 13, § 35; *Pond agt. Bergh*, 10 *Paige*, 140.) And it follows that a purchaser at judicial sale will hold. (*Knight agt. Weatherwax*, 7 *Paige*, 185; *Carpenter agt. Schemerhorn*, 2 *Barb. Ch. R.* 314.) The statute last cited, so far as it relates to vested remainders, is declaratory. (4 *Kent's Com.* 205; *Doe agt. Underdown*, *Wilks' R.* 293; *Lawrence agt. Maggs*, 1 *Eden's Rep.* 453; *Dingley agt. Dingley*, 5 *Mass.* 535; *Anable agt. Patch*, 3 *Pick.* 360; *Hall agt. Tuffts*, 18 *Pick.* 458; *Sisson agt. Seabury*, 1 *Sumner*, 243; *Yeaton agt. Roberts*, 8 *Foster*, 459;

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Wimple agt. *Fonda*, 2 *J. R.* 288; *Van Vechten* agt. *Pearson*, 5 *Paige*, 512; *Miller* agt. *McComb*, 26 *Wend.* 237; *Vanderheyden* agt. *Crandall*, 2 *Denio*, 1; *Baker* agt. *Lorillard*, 4 *Comst.* 257.)

(b) 2. The respondent's precise objection, as presented in suits for partition, has been repeatedly overruled, and may be said to be exploded. (*Wells* agt. *Slade*, 6 *Vesey Jun.* 498; *Cheeseman* agt. *Thorn*, 1 *Edw. V. C. R.* 630; *Mead* agt. *Mitchell*, 3 *Smith's N. Y. R.* 216.)

2. But further: The interests of future children in the original property are cut off by section 180. By this section, "no sale of the real estate of any infant shall give to such infant any other or greater interest or estate in the proceeds of such sale, than he had in the estate so sold; but the proceeds shall be deemed real estate of the same nature as the property sold." (See opinion of *HARRIS, J.*, in *Baker* agt. *Lorillard*, 4 *Comst.* 267; and opinions of *Judges EDWARDS and RUGGLES*, in *Forman* agt. *Marsh*, 1 *Kern.* 547-8, 551-2; *Judge PAIGE*, in *Tucker*, agt. *Bishop*, 2 *Smith*, 16 *N. Y. Rep.* 406; *MASON, J.*, *Foreman* agt. *Foreman*, 7 *Barb.* 217; *W. F. ALLEN, J.*, *Shumway* agt. *Cooper*, 10 *Barb.* 558. This section declaratory of pre-existing law. *HOFFMAN, J.*, *Sweesey* agt. *Thayer*, 1 *Duer*, 295, 302, 303; *Garretson* agt. *Gaunt*, 1 *Coll.* 577, 21 *Eng. Ch. Rep.* 578.)

(a) The effect of the statute is by the sale to transfer, *eo instanti*, all interests attaching to the real estate; to the fund which is its proceeds.

IV. The interests of after-born children are so represented by the petitioners as to be barred by the decree.

1. The jurisdiction of the supreme court in this matter is purely an equity jurisdiction. By the statutes, the ancient chancery control over estates held in trust for infants is extended to their legal estates. (*Laws of 1814*, p. 128; *Laws of 1815*, p. 103; *Rogers* agt. *Dill*, 6 *Hill*, 415; *Cochran* agt. *Van Surlay*, 20 *Wend.* 375-6; *In re Whitaker*, 4 *J. Ch. R.* 378; *Foreman* agt. *Marsh*, 1 *Kern.* 544.

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2. The equity rule as to parties, must therefore prevail in this proceeding.

(a) Such has been the interpretation of the statute by the courts in general matters of practice. (*In re Wilson*, 2 Paige, 412; *In re Lansing*, 3 Paige, 265; *In re Whitaker*, 4 J. C. R. 379-80.)

3. The rule of equity as to parties, is a rule of convenience, and the appearance of parties is always dispensed with, when this can be done consistently with the purposes of justice. (*Story's Eq. Pl.* §§ 81, 144, 147; *Reynoldson agt. Perkins, Ambler*, 564; *Adair agt. The New River Co.* 11 Ves. 429, 443-4; *Cockburn agt. Thompson*, 16 Ves. 321, 328-329; *Opinion of MARSHALL, C. J., in Elmendorf agt. Taylor*, 10 Wheat. 152; *Wiser agt. Blackly*, 1 J. Ch. R. 437, *Brown agt. Ricketts*, 3 J. Ch. R. 553, 555; *Hallett agt. Hallett*, 2 Paige, 15; *Mead agt. Mitchell*, 3 E. D. Smith, 214-15.)

In real estate controversies, it is sufficient to make the first person in being, in whom an estate of inheritance is vested, a party (with those claiming prior interests), in order to bind all future proprietors. (*Calverton on Parties*, 48, 51; *Mitford's Eq. Pl.* 173, 174; *Story's Eq. Pl.* §§ 144, 146, 147, 159; *Spencer's Eq. Jur.* vol. 2, 707; *Giffard agt. Hart*, 18 Sch. & Lef. 409; *Sherritt agt. Birch*, 3 Bro. Ch. R. 228; *Haycock agt. Haycock*, 2 Ch. Cas. 124; *Reynoldson agt. Perkins, Ambler*, 5, 64; *Wills agt. Slade*, 6 Ves. 498; *Lloyd agt. Jones*, 9 Ves. 37; *Elmendorf agt. Taylor*, 10 Wheat. 152; *Corning agt. Baxter*, 6 Paige, 178; *Nodine agt. Greenfield*, 7 Paige, 544, 548; *Cheeseman agt. Thorn*, 1 Edw. Ch. R. 629; *Mead agt. Mitchell*, 3 Smith, 210, 214-15; *Opinion of HARRIS, J., in Baker agt. Lorillard*, 4 Comst. pp. 266-7.)

(a) Much more strongly does this rule apply to proceedings like the present, which are strictly amicable, and where the interests of future children, instead of being hostile to the interests of the petitioners, would be identical with them. (1 Barb. Ch. Pr. 334-5; 4 Monroe, 255,

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416; *Brown agt. Armistead*, 6 *Rand.* 594; *In re Massac*, 15 *How. Pr.* R. 383.)

5. The special guardian is the actual representative of all the children interested, living or unborn. By section 171, he is made "guardian in relation to the proceedings." (*Mead agt. Mitchell*, 5 *Abb. Pr. R.* 106; *Baker agt. Lorillard*, 4 *Comst.* 266-7.)

6. The distinction suggested between this proceeding and sale in partition, is untenable. (*Rev. Stat. 5th ed. vol. 3, p.* 176, § 180; *Mead agt. Mitchell*, 5 *Abb. Pr. R.* 106; 3 *E. D. Smith*, 214-16; *Baker agt. Lorillard*, 4 *Comst.* 266-7.)

V. The sale is not "against the provisions of the will."

1. It is directly in aid of the will. It will rescue the property from loss, and preserve to all the infants "real estate of the same nature," and of the same value (§§ 179, 180).

2. The ninth clause of the will expressly provides for a sale of this property by the executors, for the payment of legacies, in case they shall "think" such sale "advisable" for that purpose.

VI. After-born proprietors would, by the nature of the case, be concluded from opening the decree.

1. The ground of the application is that of necessity.

(a) This necessity is the preservation of the property directly.

(b) It arises from a statutory lien on the property, which renders it liable to sacrifice.

(c) The facts upon which the decree is to be based are immutable.

2. The sale will be for their benefit. (*Story's Eq. Pl.* § 81; *Brown agt. Armistead*, 6 *Rand.* 594; 29 *Miss.* 146; 5 *Hammond*, 245; 1 *Barb. Ch. P.* 335.)

GEO. BOWMAN, *Attorney,*
and of Counsel for Appellants.

Respondent's answer to appellants' points:

The application of the appellant is two-fold.

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1. To confirm the sale.
2. To compel the purchaser to take.

First—As to the confirmation of the sale. As the purchaser cannot be compelled to take until the sale is confirmed, he has a right to object, and does object, both that the sale has not been confirmed, and that it ought not to be confirmed. The sale ought not to be confirmed for three reasons :

I. It is easy to raise by mortgage, on the interests of those seized *in presenti*, the amount required to pay the assessment, and a sale is not necessary. The finding of the referee, and action of court, is conclusive on this question.

II. The whole proceeding entirely overlooks the relative interests of the life tenants, the vested remainder-men, and the contingent. They are bound to contribute in proportion to their respective interests ; and *non constat*, a mortgage for \$100 may raise all that is requisite to pay the infants' share of the charge. Yet this proceeding if sanctioned, would take the whole charge out of the *corpus* of the estate, and not out of the income. Suppose on the corporation sale, the amount could be raised by a sale for a less term than the life estate, why should the charge be taken out of the corpus, at the expense of the remainder-men, and to the relief of the life tenants ?

III. The sale purports to be of the whole estate in remainder, whereas it ought to be a sale of the remainders now vested, subject to the incumbrance of being liable to being opened to let in after-born children. Such a case would be of the precise estate and interest of the infants ; but the sale proposed, and which is sought to be confirmed, is of an estate of which the infants are not seized.

Second—The purchaser ought not to be compelled to take the title.

I. Because the infants are not seized of the whole estate in remainder, but their estate is liable to be opened to let in after-born children, who will then be seized of an estate

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which neither of these infants, nor their guardian, nor this court can sell, or order to be sold. And that is an estate which the purchaser could not by possibility obtain, though he would be obliged to pay for it. (*Baker agt. Lorillard*, 4 *Comst.* 257; *Macomber agt. Miller*, 9 *Paige*, 265; *S. C.* 26 *Wend.* 229.)

The counsel for the appellants, in his third point has cited a large number of authorities, which show that the remainder in these infants is a vested and not a contingent one. We do not question that. But our point is, that though vested, it is liable to be opened in behalf of the after-born children; and that the remainder-men now in *esse*, cannot, either by permission of the court or otherwise, do anything to cut off the interest of after-born children, or to prevent their taking as soon as born. The case of *Baker agt. Lorillard*, in 4 *Comstock*, 257, cited by the counsel, is clear and to the point on this proposition (*Cochran agt. Van Surley*, 20 *Wend.* 374). The counsel also cited cases to show that the existence of such an interest in persons not in *esse*, is no objection to a partition. We have several answers to this:

1. Tenant for life, and even tenant for years, may sue for partition. (2 *R. S.* 317, § 1; 1 *Story's Equity Jur.* § 656; *Woodworth agt. Campbell*, 5 *Paige*, 518.) And it does not follow, as the counsel supposes, that because one can have partition, he can convey in fee.

2. It is well settled, that a judgment or sale in partition, does not affect the limitations over. They are protected, and attach to individual shares, &c (*Cheeseman agt. Thorne*, 1 *Edwards' C. R.* 630). In such a case the sale (if any took place), would be subject to the right of the after-born children. It is not doubted that such a sale could take place in this case, in which the purchaser would take with such incumbrance. But such is not the sale to the respondent. He contracted to buy the whole estate, and there is no

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person now living who can give him this whole estate, free from this incumbrance. And therefore,

1. This sale by the guardian ought not to be confirmed, but only a sale of the present infants' interest, subject as aforesaid.

2. The purchaser cannot be obliged to take the title, when it will thus be liable to be divested in favor of after-born children. The counsel makes a point that the judgment of sale would protect the purchaser. To this we answer :

1. The cases he cites in support of his position (so far as they relate at all to the case, and some of them do not), merely go to the extent of ruling that a sale otherwise good, will not be vitiated by a misapplication of the proceeds. (*See Curtiss agt. Price*, 12 *Ves.* 89; *Jackson agt. Edwards*, 7 *Paige*, 397.)

3. It is quite novel doctrine that a judicial sale can, any more than any other sale, convey a greater interest than the party has. If it could, it would be quite easy to convert a life estate into a fee. Yet after all, the court is bound to inquire, where is the estate of the remainderman? If this doctrine is true, then it must be that when an infant is seized of a life estate, his special guardian may, by a sale, cut off the remainder, though vested *in presenti* in a person of full age, and capable of granting or refusing to grant. Another point made by the appellant is, that by the sale the proceeds become clothed with the attributes of the real estate. To this we answer :

1. The purchaser has nothing to do with that, nor any control over it, and is not to be made to take the responsibility of its being so.

2. The power of the court to order a sale does not depend on its power to control the proceeds, but only on its authority to order a sale.

3. The power exercised in this place is a statutory power, and the real question is, has the statute given the court

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power to order a sale of the estate of persons not in being? The power is conferred by the statute (2 R. S. 194, § 170), to "infants seized," &c. The remainder-men in possibility, that is, the after-born children are not "seized" until they are born. They then become seized *in presenti*. And the power of the court to order a sale is confined to infants "seized," and it cannot be extended to persons not born and not seized (*Per Bronson, J., in Baker agt. Lorillard, 4 Comst. 270*).

4. The power of the court is to appoint a guardian of "such infant," that is of the infant seized (2 R. S. 194, §§ 79, 171). It is he alone who can sell. Now a guardian may be appointed for A. B., to sell A. B.'s interest. But can the guardian of A. B. be authorized to sell the interest of C. D., for whom he is not guardian?

5. But the true test is, could these infants, even if of age, make a conveyance that would cut off the interest of after-born-children? If they could not do it themselves, surely their guardian could not.

In his fourth point, the counsel for the appellant invokes to his aid the doctrine of representation, and insists that in this proceeding, the vested remainder-men in *esse* so represent the contingent remainder-men in *posse*, as to bind the latter by a decree of sale. To this we answer:

1. The counsel truly states this to be a rule of practice and convenience, but he omits to say that it is never allowed to obtain where it can affect the rights of parties holding adversely to, or in conflict with those of the representative; *i. e.*—Where those parties are in existence at the time of the controversy, but *aliter* of future and remote estates, of parties not in *esse*.

2. He omits also to state that the rule is never allowed to obtain where the representative has an interest in conflict with that of the party whom he would represent. Thus the tenant for life or in tail may represent the remainder-man in a controversy with a stranger as to the whole

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estate, but never where the question is one of conflict between the life-tenant and the remainder-man. Or a trustee may represent his *cestui que trust* against a third person, but never when the question is between trustee and *cestui que trust* (*Story's Eq. Pl.* § 146, *et passim*).

3. But the best answer is, that this is a statutory proceeding, to which the rule has never been applied, and to which it cannot be made to apply, without giving to the guardian of A. B. the power to sell the interest of C. D., for whom he is not guardian, and over whose estate he has no authority, and whom the statute does not authorize him to represent. All he can represent under the statute, is living minors *in presenti*.

II. The purchaser ought not to be obliged to take the title, because the sale is not in conformity with the order of sale. The guardian was allowed to sell at private sale within forty days. After that time he must sell at auction. Yet the sale to respondent was after the forty days.

III. The claim of Wintjen under his purchase, is an incumbrance from which appellant has a right to be released. Having received actual notice of that claim, he cannot be protected against it as a bona fide purchaser without notice.

IV. The case stands thus: The purchaser is to be compelled to take a title, where he is liable to have his whole title divested in behalf of a prior purchaser—to have a portion of his estate entirely divested by after-born children, and when it is very questionable whether the guardian has not exceeded his authority in selling at private sale, after his power to do so had expired.

Third—The contract was to take the title if approved by Barrett and Brinsmade, and by the court.

1. Such approval was by contract a condition precedent, and it is not in the power of the court to dispense with it. (*Woolsey agt. Wood*, 6 T. R. 700; *Mason agt. Harvey*, 20 Eng. L. and E. 541; *Col. Ins. Co. agt. Lawrence*, 10 Peters, 513.)

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2. The approval not having been obtained either of B. & B., or of the court, the condition has not been performed.

W. C. BARRETT,

J. W. EDMONDS,

Of Counsel for Respondent.

Reply to respondent's points :

I. It would be easy to show that a mortgaging of the estate would be impracticable. But this, it is supposed cannot be discussed. All this has been passed upon.

1. The court has found the sale necessary.

2. The court has ordered it. All the discussion of the counsel as to the propriety of selling has been passed upon, and it is supposed, will not now be considered. The only point discussed below, or expected to be here, was the objection to the title.

II. The counsel says : The sale sought to be confirmed, is "of an estate of which the infants are not seized." This is not so ; upon all the authorities, the infants are unquestionably seized of the whole estate in remainder. The property may continue unsold until others shall become seized. But at present no others are seized, and there is no presumption that any others would ever be, even if the property remained unchanged. Now the question is, whether a necessary judicial sale conveys the title as it now is, or as it would be if no sale took place till another infant were born. The jurisdiction of the court to make a sale is unquestioned by the counsel, but he insists that the purchaser must take, subject to the title and claims of the after-born children. As if the court were not as competent to protect the interest of the infants not yet born, as of those living and absent from the realm. Absence from the country of one or more of the infants would not prevent the court acting and disposing of its property, if clearly for its benefit. *A fortiori*, the court will not hesitate to act on account of interests not now existing, and which may never exist, and which the court can and does

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fully protect. The infant born can do nothing of himself; the court acts for him from necessity, on account of his incapacity.

The proposition on the appellant's part, that by section 180 of the statute, each infant hereafter to be born will, *eo instanti*, be vested with his share of the fund in court as "real estate," is not disputed by the counsel. And if not, can it be contended that he is vested at the same time with a similar interest in the other real estate, by the conversion of which the fund has been created, to which the statute expressly attaches his claim. That the court can sell the whole existing interest is undisputed. Now, can the title which the court sells be changed after the sale? Now, at the time of the sale it is the "whole" estate. Can any future event make that which the court have sold any less than it was when they sold it? Public policy forbids this—the interest of the infant forbids it. Purchasers will not buy title subject to vague and undefinable incumbrances and contingencies. And if the court cannot sell the whole title as it exists, the interests of the infants born and unborn must perish.

III. By the unanimous judgment of the court of appeals (*Mead agt. Mitchell*, 3 *Smith N. Y. Rep.* 216), this objection was overruled in a partition case.

The counsel does not appear very forcible in showing why the question here is not substantially the same as in a partition case. In fact, the counsel admits the question is the same as in a partition case, but insists that on a sale in partition the purchaser takes subject to the claim of any after-born infants. This is submitted to be a plain and palpable fallacy. *Mead agt. Mitchell* (3 *Smith N. Y.* 216, and cases cited), explode this idea. And the court expresses the opinion that a sale in partition binds after-born infants under the general principles of equity practice, independent of our statute. The counsel for appellant has not been

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guilty of the supposition imputed to him, that "because one can have partition he can therefore convey a fee."

But the question is, if a regular sale in partition cuts off this objection, why does not a regular sale in these proceedings have the same effect? The counsel for the respondent does not argue that the sale in this case differs from that in partition, but concedes the same effect to each, and says: "It is well settled that a judgment or sale in partition does not affect the limitations over. They are protected and attach to the individual shares," etc. (*Cheeseman agt. Thorne*, 1 *Edward's C. R.* 630).

Vice Chancellor McCoun in the last case cited, said: "If there were no statutory provision, the case of *Wells agt. Slade*, (6 *Ves. p.* 498), would be an authority for a decree in such cases. "The court decided there could be a partition, although other persons might come in *esse* and be entitled; the chancellor observing that if it were not so, then in every case where there is a settled estate with remainders to persons who may come in *esse*, there never could be a partition. The limitations over are not affected by a partition or sale. They are protected and attach to the individual shares which, by the decrees, are preserved in trust, according to the will." Now, does the counsel understand that the limitations over are not affected by the sale, for any other reason except that they attach to the shares in the fund produced by the sale, and not to the real estate sold?

Clearly that is the way they were protected in that case, and also in this. From the time of the sale all interests which would have attached to the real estate, if it had remained unsold, attach to the shares in the fund which the law preserves as substituted "real estate," in order that no injustice may be done. Now I submit that the counsel has clearly misconstrued the case of *Cheeseman agt. Thorne*. He says: "In such a case the sale would be subject to the right of after-born children." Now I ask the

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reading of that case, to see if the court contemplated any such thing as the right of after-born children attaching to anything but a share in the proceeds of the sale. The interests of children in *esse* unquestionably attach to the funds as real estate—can it be that the interests of any hereafter to be born can attach to any other?

IV. The counsel says the case of *Baker agt. Lorillard* (4 *Comst.* 257), is clear and to the point, that the sale will leave the land subject to the claims of after-born children. This is a clear mistake. The point was not involved in the decision. The case was decided on another point. The point, however, was suggested, and HARRIS, J., who delivered the principal opinion in the case (4 *Comst.* pp. 266 and 267), expressed the view that claims of after-born children were cut off. No one expressed dissent to this view but Justice BRONSON, who did not argue or discuss the question. The principles and correctness of Justice HARRIS' views accord with the numerous cases cited on the appellant's opening points.

V. The counsel says a judicial sale can convey no more than the parties have; that, it is not necessary here to dispute. Our point is that the parties have now the whole estate. To that effect the authorities are innumerable. We say the sale is of the whole estate, as it now is, freed from the danger of interests not now existing, and which may never exist; which are now totally incapable of any valuation or estimation, and are hence a totally disturbing and inadmissible element in any sale now to be had, and which, if they ever do exist, must follow the estate where it has lawfully gone—that is, into the shape of a fund preserved by the court as "real estate," for that very purpose.

In the case of *Knight agt. Weatherwax* (7 *Paige*, 185), the chancellor treated the question as to whether a sale in which all present interests were represented, would cut off those who might in the absence of a sale at some future

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time, claim an interest, as being a question as to the interests now represented (a remainder), being vested or not. He says (7 *Paige*, 185): "The present defendants, therefore, have no absolute interest in the premises during the life-time of their respective mothers, although they are now their apparent heirs at law. It may be somewhat doubtful, therefore, whether the remainder is so vested in these defendants, that a decree for a specific performance against such presumptive heirs, will be a bar to the legal title of others, who may happen to be the real heirs of the tenants for life, at the time appointed for the vesting of the ultimate remainders in fee, though I think it is. And he cites *Nodine agt. Greenfield* (7 *Paige*, 544).

The cases cited in the opening show that the parties to this proceeding are vested with the whole title to this estate.

VI. The counsel says, the question is as to the "power of the court to order a sale of the estate of persons not in being." Not at all. There is no such estate existing or in question. We have the parties here who, by the authorities, hold the whole estate (which must exist somewhere upon all the authorities), and propose to sell that. But the respondent objects to such sale, on the ground that if the property should remain unsold, at some future time other parties might become interested in it. How long then must this property continue inalienable, no matter how great the necessity?

VII. The counsel says, infants unborn are not "seized," and hence the court cannot sell their interest. Very true, and for that very reason the court does not undertake to sell their interest. They cannot sell an interest which does not exist. They sell the existing interest, which, upon the authorities is the "whole estate." The court does not deal with an interest that does not now exist, and never may, and as to whose future existence or non-existence there can be no presumption. It is sufficient that the

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law now converts and sells the estate and the whole interest as it is. If a child should hereafter be born, it will be vested with an interest in the share of the substituted "real estate," now represented and held by its brothers or sisters, or both, and can claim no interest in the real estate which was lawfully sold and converted before it was capable of taking any interest.

VIII. A great fallacy pervading the respondent's argument, is his treatment of the mere possibility of a future interest in the estate, in case it remains unsold, as an adverse interest not represented before the court. One answer is, the authorities show the parties to these proceedings now have the whole interest.

It is an indispensable condition of the law and its administration, that the whole exists somewhere, and is subject to legal control. Besides, the interest of a child hereafter born will simply be distinct from, not adverse to, that of those living, in any legal sense applicable to this branch of the case. Within the scope of the rules cited, can there be adverse interests which stand or fall together under precisely the same title, and are mutually dependent, if not on each other, yet on one common direct source, which neither can deny? The interests, if deemed adverse, would be mutually suicidal. Neither could exist consistently with the denial of the other.

IX. The respondent concedes the power of sale. The question made is solely if the sale can be of the whole estate, or a sale subject to the rights of after-born children, to have such interest in the property in the hands of any purchaser, as they would have if no sale took place till the last child of either of the three daughters shall be born. Now it is submitted that a sale, subject to such vague, uncertain future contingencies, is impracticable. All purchasers would be repelled, save such as deal in lotteries forbidden by the laws of this state. What would be a reasonable price for such interest is incapable of estima-

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tion. To order such a sale would be inconsistent with the interest of the infants now "seized," for whose benefit by the statute, the court is required to act.

X. A word more as to the authorities in partition cases, cited by us. Our position is not correctly stated by the counsel. Those authorities are cited to show that the possibility of a future interest in infants not in *esse*, is no objection to a sale in partition, which shall bar such future interests, if any. A sale under partition proceedings, unlike partition itself, is not a matter of right to either life-tenant or remainder-man (as the counsel seems to imply on the 3d, 4th and 5th pages of his argument), but, is purely a creature of statute, and can only be had by consulting the interest of all the parties interested in the premises, and is discretionary with the court. We insist it is identical in every substantial aspect with a sale under the present proceeding. The counsel, in searching for a distinction between a sale in partition and the present one, has evidently confounded partition, which always was a matter of course, with a sale under partition, which is a naked discretionary power conferred by special statute.

XI. The respondent's argument, drawn from the mode of appointing the guardian is fallacious. In partition proceedings the guardian is appointed, under provisions of the statute, almost literally the same as in these proceedings (*Rev. Stat. 5th ed. vol. 3, p. 603, § 2*). This language has never influenced the court against ordering sales in partition. (*Cheeseman agt. Thorne; Mead agt. Mitchell; see also printed points, p. 7, point 5.*) Indeed, the argument of the learned counsel turns against himself. If the statutes do not express the power to sell an interest of an unborn child, or to have a guardian for such, it is because there is no such interest. The living children are vested with the whole.

XII. On page 11 of respondent's points, the counsel says: "All the guardian can represent under the statute

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is living minors *in presenti*." In 5 *Abbott*, 106, the court think differently. This is strictly a proceeding *in rem*, and the guardian is rather a guardian of the estate in remainder, than a mere guardian *ad litem* of the living infants under the statute; he is appointed "in relation to the proceedings."

XIII. On the point of representation (as has been remarked), the respondent mistakes a distinct interest for a hostile one. Such a fallacy would exclude the possibility of representation in any case. On the contrary, we repeat that the interests of the supposed infants hereafter to be born, not only are exactly identical with those of the petitioners, but they demand this interposition of the court (*See referee's report, fols. 68, 71*). To say that a trustee cannot represent his *cestui que trust*, when the one is plaintiff and the other is defendant, is trifling with the question.

XIV. It is objected that the sale was not made in forty days, as prescribed by the order. That was well understood by both parties, and that the court had power to amend that provision and approve the contract, if he saw fit. For that purpose application to the court was contemplated, and the contract was wholly subject to its approval. The respondent cannot now object to the court's doing what the contract proposed and contemplated it should do. No such matter was presented below. (*See Judge SUTHERLAND's opinion.*)

XV. Next is suggested the claim of Wintjen. No such claim exists. Wintjen refused to take, and had his money paid back, upon the contract with Wilson being made. On the argument below Wintjen's counsel appeared, and still refused to take the title, and merely wanted the court to make some one pay him for examining the title. If the respondent wishes to investigate if Wintjen makes, or has any claim, he can take a reference for that purpose. No

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such point as this was urged below. (*See Judge SUTHERLAND's opinion.*)

XVI. It is further objected, that Barrett and Brinsmade were to approve the title, which they never did. Yes: but they had no absolute, unreasonable or capricious right to reject the title. Reasonable ground for doing so must be made to appear. The law deems every one "satisfied," when he shows no reasonable cause for not doing so. One is bound to be satisfied, if he ought to be, in reason. (*Doe ex dem. Baker agt. Jones, 2 Car. and Rei. (Ct. Eng. C. L. Rep. 743.) Perkins agt. Washington Ins. Co., 4 Cowen, 645.*)

XVII. The order below is submitted to be palpably erroneous and improvident, in charging the guardian with costs, while at the same time depriving him of the only fund, of which he had in good faith obtained possession. The guardian is personally charged with costs, without the suggestion of any misconduct on his part.

XVIII. It is finally submitted, that the order appealed from should be reversed; and the question being between infants—wards of the court, and an individual purchaser—if the latter has made a mistake—he should pay the costs and expenses incurred through that mistake, which, if satisfied of the title by the judgment of the court, and fully vested with the whole property, he can well afford to do.

GEO. BOWMAN,

for Appellants.

Plaintiff still advised defendant that he was confident of being correct in his views on the question, and advised an appeal to the court of appeals; it was finally concluded between them not to take an appeal to the court of appeals, as they had information that more than \$14,500 could be obtained for the property from a Mr. Woodward, who wanted the property, and who agreed to pay \$500 towards the expenses of a further sale if he should become the purchaser. It was therefore agreed to institute a partition suit and terminate the other proceedings. A suit having

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been brought by Wilson against Tallman for the purchase money, while the decision of the general term was held under advisement, procured a settlement of it without costs being charged to Mr. Tallman. About March, 1861, the partition suit was instituted in the supreme court, and which (after stating the details in reference to its progress) was terminated by a decree of sale in partition, Feb. 16, 1863. The plaintiff then stated some miscellaneous services he had performed for defendant as attorney and counsel. No reference to the liability of Tallman personally for the payment of the plaintiff's claim—plaintiff stated that Tallman, at one time when conversing on the subject, said: "You know how I am situated with regard to this; that I may have to pay it all myself, and it may be a loss." It was repeatedly referred to that it must be paid, of course, that he expected to see plaintiff paid; but if it turned out unfortunately, it must be taken into account, he having no profit out of it—defendant understood very well this suit was merely to ascertain the amount to protect him. Tallman was really anxious to pay, but he wanted to conduct the business of his trust safely, and with the advice of counsel; and to be protected in the payment which he made. A stipulation signed by the defendant's attorneys and counsel was then read in evidence, as follows: "It is admitted by the defendant that the amounts severally claimed for services in the several suits and proceedings mentioned in the complaint in this action, are correct charges for such services respectively, and that no question shall be made as to the amount of such services. Dated Feb. 17, 1864.

C. J. & E. DEWITT by
ELBRIDGE T. GERRY,

of Counsel for Deft.

The cross-examination of the plaintiff is here given as it occurred:

Q. Had you ever the conduct of a proceeding for the sale of infants' real estate before? A. I think I had; I

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am not positive ; I do not call to mind any instances at this time. Q. Had you ever seen this will before it was brought to you by Mr. Tallman ? A. I never saw it until he brought it to me. Q. State now, if you please, when you was first employed, and when you finally closed the whole matter ; give me the whole period which the services covered. A. The commencement was in June or July, 1859, and the ending May or June, 1863 ; four years. Q. I observe the first jurat of the petition for the sale of real estate for infants seems to be sworn to on the 10th of November, 1859 ; from July to that time you were preparing matters ? A. We were examining the will, and about the assessments, and whether there could be any mode of getting money by mortgage. Q. You were getting ready to take proceedings ? A. Yes ; when we found out what it could be. Q. State when the supreme court, at general term, affirmed the decision of Judge SUTHERLAND, at special term, deciding the sale was without jurisdiction. A. It was in December, 1860, I think. Q. About a year and a half was occupied in that abortive proceeding ? A. I think not. I think the proceeding was commenced in November, and disposed of in December of next year. Q. When did you institute the partition suit ? A. February 1st, 1861, the complaint was sworn to. Q. If that proceeding had been adopted in the beginning, it would have gone through successfully and without difficulty ? A. I cannot tell. Your opinion is better than mine. Q. I ask your opinion. A. How can I tell what would have happened on a proceeding undertaken under other circumstances ? Q. It did go through successfully ? A. Undoubtedly it did. Q. And was there any opposition to it ? A. I do not think there was any active opposition to it. Q. Any appearance of counsel or attorneys ? A. Not adversely to us. Q. There were appearances for the defendants ? A. Yes, sir. Q. Did the purchaser in that proceeding object to the title ? A. No, sir ; he took the title. Q. Could not that proceeding, if it

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had been instituted in the beginning and carried on with the same skill with which it was conducted by you, have been successful? A. I do not see any reason why it should not have been. Q. Did the question which caused the difficulty in the proceeding for the sale of the infants' estate, arise under the eighth clause of the will? A. I think that is the principle cause; it does not occur to me that there is any other now affecting the matter.

Defendant's counsel reads to the witness the eighth clause of the will, as follows: *Eighth.* I give, bequeath and devise to my daughters, Martha Williams, wife of Israel Williams, Emily N. Tallman, Cordelia L. Tallman, and Mary Elizabeth Tallman, all the residue of my moveable property, together with all my lands, tenements, hereditaments and real estate, situated in the township of Shrewsbury, county of Monmouth, and state of New Jersey, and my house and lot corner of Whitehall and Bridge streets, in the city of New York, subject to the bequest made to their mother, my said wife, and also subject to the payment of the bequest hereafter made to my three daughters, all which bequests is given to them during their natural lives, in equal portions, share and share alike, and after their decease to their children, the child or children of each to take the share of their mother; and in case that any of my said daughters should die without lawful issue, then I order, and my will is, that the portion devised and bequeathed to such daughter or daughters shall be divided between the remainder of my children, in equal portions, share and share alike.

Q. Was the objection to the title that these devisees had only estates for life, with a remainder to their issue, and you could not sell the interests of those unborn children?

A. I do not think the objection was ever put in that shape; I do not think any one ever spoke of selling the interests of unborn children; there could be no such interest until the children were born; the objection was that no sale of

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the property would prevent the claim of unborn children attaching to the property when they came to be born. Q. Was not the objection that you could not cut off the interests of unborn children? A. You express it in that way; I think that is not the proper way to express it. Q. Was not that the objection? A. Yes, sir. Q. You say that you examined the subject before you took steps, and as I understand you, examined the authorities? A. I did; my examination, however, was continuous after that, and perhaps greater than the amount of examination at the outset; enough examination took place at the outset to satisfy me of the safety of the proceeding. Q. Did you at the outset, and before you drew the petition, examine the statute on the subject? A. I remember I did, and more than once too. Q. Did you read this section of the statute before you drew up the papers? 2 R. S., section 195, original section 176, entitled "of proceedings in relation to the conveyance of land by infants, and the sale or disposition of their estates." "But no real estate or term for years shall be sold, or leased, or disposed of in any manner, against the provision of any last will, or of any conveyance, by which such a term was devised or granted to such infant." A. Most unquestionably I did. Q. Did you then take into consideration the question whether this proceeding was not a sale or attempt to sell this property, in violation of that statute? A. Unquestionably I did, whether it was or was not such a thing. Q. Did you look at the case of *Cochran agt. Van Surley* (20 *Wendell*, 365), in reference to the proceeding you were about to take? A. I examined that case in the course of the proceeding. Q. Did you do it before you entered upon the proceeding, and prepared the petition? A. I will not undertake to say I did. Q. When did you look at it first? A. I do not remember when I looked at it first. Q. Did you look at it at all until after the objection was made to the title in reference to this case? A. I think I did. Q. I ask you to swear

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whether you looked at it at all until after an objection was made to the title? A. I cannot positively say I did. Q. The chancellor says in this case: "And where the contingent limitation over is to persons not in existence, or whose consent cannot be obtained, the fund cannot be appropriated for the support of those who are only presumptively entitled to the same, and whose interests therein may never vest in possession. (*Errab agt. Barlow*, 14 *Ves. R.* 202; *Turner agt. Turner*, 4 *Sim.* 430.) For this reason the chancellor was not authorized to direct a sale of the interest of the children of T. B. Clark, in the property in question, for the maintenance and education, under the general act concerning infants (*Laws of 1814*, p. 128), unless the purchaser was willing to take the title subject to the contingent rights of other persons, who might eventually become entitled to an interest in the premises under the limitations in the will of Mrs. Clark." Is not the statute to which the chancellor refers as laws of 1814, incorporated in the Revised Statutes concerning the sale of infants real estate? A. I should be unwilling to swear it is; the statute refers to it. Q. The book says, this case was decided in December term, court of errors, 1838. You have mentioned the case of *Baker agt. Lorillard*, as being one case you examined; will you swear you examined that case before you presented the petition for sale in this case? A. I can only swear it is a very strong impression I did; I am quite confident I did. Q. Do you remember reading this portion of the opinion of his honor, Chief Justice Bronson, in which he says: "The children of Campbell, who were not born at the time of the sale, in 1825, were not and could not be affected by that sale?" A. I read that. Q. That case appears to have been decided in 1850. Do you recollect whether you looked at the case of *Rogers agt. Dill* (6 *Hill*, 415)? A. I think I did. Q. Do you mean before you instituted the proceeding or afterwards? A. I cannot be positive how soon. Q. Will you say you

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did it before? A. I will not; I am liable to be mistaken if I did. Q. Then you have no recollection of having looked at it before the proceedings were commenced? A. I recollect scarcely any particular case; I do not recollect by the title of particular cases; I examined all the cases I could find. Q. The head note in that case reads: "The power of the court of chancery to order the sale of real estate belonging to an infant is derived entirely from the statute. A sale of real estate devised to an infant, if ordered by the court of chancery, contrary to the provisions of the devise, is utterly void, and passes no title to the purchaser." You looked at this case before the proceeding was closed, but you cannot say you did before commencing it? A. I cannot say what particular period. Q. Had Mr. Tallman anything to do with the legal question as to how you should proceed in this case, determining the mode of proceeding? A. No, I presume not. Q. When you use the royal pronoun "we," you do not mean to include him as being responsible in any way for the method of proceeding you adopted? A. No, sir. Q. Did not that whole proceeding become utterly useless and valueless, in consequence of the decision of the court that you had no right to adopt it? A. I am not prepared to say it was useless and valueless; I think there is a value to the presenting of questions, and the discussion and decision of them; I think there is value in bringing a piece of property before the community, so that the circle of those interested in it may be enlarged, and a better price obtained; all these things I think have value; if you want to prove that the proceeding was perfectly valueless, you must ask some one else; I do not think it was. Q. Did not the proceeding become utterly valueless in regard to that property? A. I think not; it did not attain the result of a sale under the proceeding, of course. Q. Was it not utterly worthless as a proceeding to sell the property? A. It turned out ineffectual. Q. Did it not turn out utterly

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worthless as a proceeding to sell the property? A. It turned out ineffectual to sell the property. Q. What do you mean by that? A. Ineffectual, as I always understood, means without attaining the result. Q. And that was the sale and conveyance of the property to a purchaser? A. Yes, sir. Q. For the purpose of selling the property and paying the assessment, was it not utterly useless? A. I cannot use the term useless; it was valueless for the mere question of effecting a sale. Q. And paying the assessment? A. No; because the whole of that ineffectual proceeding is valuable in connection with another. Q. You think it necessary in a legal proceeding to start wrong, in order to get right? A. Not at all; I think we started right, and kept right, and would have kept right, if we thought it more for our interest to have held the original purchaser. Q. In saying that you oppose yourself to the judgment of the special and general terms of the supreme court, do you not? A. I have not considered it in that point of view; I do not know how they might consider the question if presented again. Q. I speak of the judgment of the special and general terms, which was pronounced? A. I think the special and general terms erred in that. Q. Did you advise Mr. Tallman to take that proceeding? A. Yes, sir, under the circumstances which I have stated. Q. Did he ever make any special agreement with you to pay the costs of that proceeding? A. No other special agreement than to pay them, that is all; he always promised to see them paid. Q. I speak of the time the proceedings were instituted? A. I cannot say what particular words passed. Q. Did he ever make any agreement in reference to this proceeding at the time, that he would pay the costs? A. I do not recollect, particularly, what was said at the time of initiating the proceeding. Q. Do you recollect anything that was said at the time on the subject? A. Not at the particular time of his first calling. Q. Had he any interest in the property you sought to sell? A. I believe he had

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no pecuniary interest. Q. Had he any interest. A. Yes; he had the interest of taking care of the property for his family, his infant nieces and nephews. Q. The same interest he had in his sisters'? A. Yes, sir. Q. You say he had no pecuniary interest? A. I never understood he had. Q. Why did you make him a party in the partition suit? A. Because I did not know but that some one might turn up that might think he had an interest. Q. You made him a party to the partition suit, knowing that he had no interest? A. Considering that he had none. Q. And your apprehension was that some one might suppose he had? A. Possibly; there was no trouble in making him a party; he was one of the Tallman family, and executor under the will. Q. Did you make any one else a party that had no pecuniary interest? A. His brother, Henry Tallman. Q. You did it for greater caution? A. Yes, and as involving little trouble. Q. Were he and his brother parties to this proceeding? A. I do not know but they were, as much as any one; Mr. William M. Tallman was appointed a guardian. Q. Would that make him a party to the proceeding? A. Not a party in interest, but I consider it would make him a party to the proceeding; a proceeding taken in his name and on his behalf, after his appointment as guardian. Q. You think the special guardian in a suit is a party to the suit or proceeding, do you? A. I think in that case he may be looked upon as a party to the proceeding; I have not considered the point. Q. Was Henry A. Tallman a party to the proceeding? A. I do not think he was. Q. Were not the petitioners in that case, simply these daughters and their husbands? A. You have it all in the documents, and it is safer to refer to them than for me to name the parties. Q. I ask whether these proceedings were not in behalf of these ladies and their children which were born? A. Yes, sir. Q. And of nobody else? A. No, sir; we did not have any of the unborn children represented. Q. Did your petition set out this clause of the will, which I read to you

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in part? A. Yes, it contains an extract from the will. Q. It set out that part upon which the difficulty arose? A. Yes, I think it did. Q. Was Mr. Tallman a party to that proceeding, in the way in which you use the word "party," in any other sense than that he consented to become a guardian of the infants? A. He was the principal party to the whole thing; the only real moving party in the whole matter, I ever knew or saw. Q. My question is, was he a party to that proceeding, except that he consented to and became a guardian of the infants? A. It does not occur to me that he was a party to the proceeding, any more than becoming a special guardian. Q. When you presented the report of the referee and got the order of confirmation for the sale, which I see was granted by Judge BONNEY, on the 24th of February, 1860, did you suggest to Judge BONNEY any difficulty growing out of that provision of the statute? A. If Judge BONNEY granted the order on the referee's report, which appears here, I have no recollection of speaking of that particular point. The matter had all been investigated by the referee. Q. You have no recollection of calling Judge BONNEY's attention to that? A. No, sir. Q. When you presented the report of the special guardian to Judge LEONARD, on the 16th of April, 1860, and got the order confirming the sale, did you call his attention to it? A. No, sir, I do not recollect that I did. Q. I observe by the order that Henry Wintjen is said to be the purchaser? A. He was the original purchaser; Wilson came in after him. Q. After Wilson had refused to complete the purchase did you advise application to the court to compel him? A. Yes, sir. Q. And drew the paper which appears in that case? A. Yes, sir. Q. Is that paper, signed Barrett and Brinsmade, the objection which they made to the title, or a copy of it, dated New York, May 28, 1860? A. I think it is. Q. And the other one, Mr. Cheney's, dated May 29, 1860? A. Yes, sir.

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Counsel for defendant reads both papers in evidence as follows: Objections to title by Barrett & Brinsmade, Esqs., in behalf of Henry Wilson.

14 WALL STREET, NEW YORK, }
May 28, 1860. }

DR. HENRY WILSON:

DEAR SIR—We are sorry that we have to inform you that we cannot approve the title to the property on the corner of Whitehall and Bridge Streets, which you contracted with Wm. M. Tallman to purchase, on certain conditions, by agreement, dated May 5, 1860. Our objections to the title are two-fold.

First.—The description of the premises, contained in the order authorizing the special guardian of the infants to sell, is so imperfect that it is impossible to fix any definite metes or bounds to the property, or to locate it with any degree of certainty.

Second.—It is not certain that by the proceedings, commenced by petition to the supreme court, the interests of the children who may hereafter be born to the bodies of Cordelia L. Conover, Martha S. Bennett, and Emily Lewis, are cut off.

Should you carry out your purchase, such after-born children might successfully claim undivided interests in the property, precisely as if the proceedings for the sale of the interests of their brothers and sisters had not been had.

Yours truly,

BARRETT, BRINSMADE & BARRETT.

Objections to title by Charles Cheney, Esq., on behalf of Henry Wintjen.

No. 2 DEY STREET, NEW YORK, }
May 29, 1860. }

MESSRS. BARRETT & BRINSMADE:

GENTS.—I take this opportunity to inform you that my client, Mr. Wintjen, who holds a contract in writing from Mr. Tallman, for the purchase of the property corner of

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Whitehall and Bridge Streets, being the same property which Mr. Tallman has since undertaken to sell to your client; Mr. Wintjen has not relinquished his rights, under that contract, to the property, nor has the order of the court, directing Mr. Tallman to carry that contract into effect, been vacated to his knowledge.

This is to notify you, that if your client purchases the property, he does it with a knowledge, and subject to the rights of Mr. Wintjen.

Yours, &c.,

CHARLES CHENEY,

Attorney for Henry Wintjen.

Q. What amount was paid on the purchase by Wintjen and Wilson? A. I can only state impressions; my impression is that Wintjen paid \$1,200 and Wilson \$2,000. Q. \$3,200 in all? A. Yes, one on one contract and the other on the other contract. Q. Who received these sums of money. A. Mr. Tallman received all except \$300, I think. Q. Which \$300 you retained? A. Yes, sir. Q. On what account did you receive it? A. On account of fees and expenses in that proceeding. He paid it to me as a part of the purchase money; I retained it as a part of my expenses. Q. That has never been repaid by you to Mr. Tallman or Mr. Wilson? A. No, sir, and it was never asked for, so far as I remember. Q. Was it before you appealed that Mr. Wilson brought the suit to recover back the money? A. I think it was? Q. After the decision of the special term? A. I think so. Q. How much did he claim in that suit? In my recollection, upwards of \$2,000. Q. Against whom was the suit brought? A. William M. Tallman, personally. Q. Was the ground of recovery in that suit that you could not make good the title, and he was entitled to recover back the purchase money? A. I think so. Q. Did you put in an answer? A. No answer was put in. Q. The claim which you make here of \$150, in your second cause of action, is for your counsel fees and costs in that

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suit? A. I believe so. Q. And I understand you that was settled finally, no costs being paid to Wilson? A. Yes, sir; that is my recollection. Q. The first claim you make here of \$956.06 besides interest, is for your costs and counsel fees in the proceeding which the court decided you had no right to take? A. Yes, and disbursements. Q. The third cause of action you present is for consultation, counsel fees, and services in the partition suit, over and above what you received in the case, as plaintiff's attorney, from the proceeds of the sale? A. I think not; I think the complaint alleges that the plaintiff earned in the partition suit, for fees, expenses and disbursements, \$1,500 and odd, then the taxed costs in the partition suit were deducted, and the balance only claimed. Q. I want to know what the amount of your claim is for your proceedings in the partition suit, over and above what you received as plaintiff's attorney, and from the proceeds of the sale? A. My understanding is, I claim in that suit, for costs and fees, and disbursements, \$1,533.42; I received in the suit for taxed costs and disbursements as plaintiff's attorney, and on behalf of the guardian, somewhere in the neighborhood of \$800; I claim the difference between \$1,533.42 and \$800, as stated in the complaint. Q. State what it is? A. The complaint claims, as earned in full of all charges and expenses in the partition suit \$1,533.42; there was paid for taxed costs \$724.33, also \$298.79, making \$1,023.12; subtract that from \$1,533.42, and you get the balance. Q. The account does not state this payment? A. No. Q. What was the \$724.33 received for? A. Taxed costs. Q. What else? A. \$298.79, more taxed costs for the defendant as guardian *ad litem*. Q. Who was the attorney? A. Mr. James H. Briggs; he is in my office; not exactly in partnership. Q. Your concern received the money? A. Yes, sir. Q. You were interested in these costs? A. Yes, sir. Q. You received \$1,023.12 as compensation for your services and the services of Mr. Briggs, in that partition suit?

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A. Yes, sir. Q. And you claim in addition of Mr. Tallman \$510.30? A. I believe that is so. Q. How much have you received in all for this abortive proceeding? A. All that has been received has been stated; the dates appear by the statement; the \$300 May 6, 1860. Q. April 4, you received \$100? A. I have no doubt that is right. Q. Was Judge Hoffman referee in the first proceeding? A. No, sir. Q. This will show exactly what you received in that proceeding? A. That is correct; that receipt is in my hand writing.

Counsel for defendant reads receipt dated February 21st, 1860, as follows:

SUPREME COURT.

In the matter of the petition of MARY ELIZABETH CONOVER and divers other infants for sale of Real Estate.
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1860.—February 21. Received from William M. Tallman, guardian, &c., twenty-five dollars to pay referee's bill of Charles P. Kirkland, Esq., and paid same over to Mr. Kirkland.

Also, received from same on account of printing bills and other disbursements, costs and counsel fees in above matter as follows:

1860—April 4. One hundred dollars. May 4. Three hundred dollars.

GEORGE BOWMAN,

Att'y and Counsel for Petitioners.

Q. According to that, leaving out what has been paid to the referee, and adding this \$400 to the other sums, you have received on account of this proceeding \$1,423 12? A. Yes, sir. Q. Did you advise Mr. Tallman after the general term had affirmed the decision of the special term that these proceedings were all invalid, and to commence

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a partition suit? A. I never advised the proceedings were invalid; I advised a partition suit, after a considerable interval, for the reasons I have stated. Q. When did you first present a bill or claim to him for services in the abortive proceeding? A. I do not think I presented a bill at all until after the property was sold. Q. How long after was it? A. I should think a couple of years intervened between the commencement of the proceedings and the actual sale of the property. Q. I want to know when you first presented a claim for your attendance in the abortive proceeding? A. I have stated that I rendered no bill until after the property was sold the last time; I think very soon after that. Q. How long before the suit was brought? A. I think two months. Q. Did he decline paying it? A. Yes, sir, he said he could not pay it without authority. Q. From whom? A. From the court, in this way. Q. Is that all he said about it to you? A. I think that is all he said about it at any time; that he referred the matter to Mr. DeWitt, and he thought it ought to be referred. Q. Did he tell you that he thought he ought not to pay anything for services that were good for nothing? A. No, sir, he did not tell me anything of the kind. Q. In substance, did he not? A. No, sir. Q. Did he not tell you that he had obtained the opinion of Mr. DeWitt, that it was not a service he ought to pay for? A. No, sir, he never disputed its validity any more than he wanted to be protected by some competent order of the court to pay it; and he referred the matter to Mr. DeWitt, and he thought there ought to be a reference. Q. What protection did he want? A. As trustee, or as against the parties interested, for the amount paid me; he thought it too much. Q. How much too much did he say it was? A. I do not think he specified any amount, but being a large amount, he wanted authority to protect himself in paying it. Q. He did dispute the amount? A. No other way than that—that it was a large amount and he wanted protection in paying it. Q. You

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said just now, that he said it was too much? A. I do not know that I said, he said it was too much. He alluded to the amount being larger than he felt safe to pay without advice; that he had taken advice and wanted protection. Q. You said he wanted protection as trustee? A. Yes, sir. Q. For what parties was he trustee? A. For all the parties, and special guardian for the infants. The judgment clothed him with the character of trustee. Q. You clothed him in that character, by drawing the decree yourself? A. Yes, sir. Q. Turn and read that part of the decree which makes him trustee for any one? A. He got the money. (Reads from folio 19, of the answer—order of the court.) "And that he pay over the remainder of said proceeds arising from said sale to the said William M. Tallman, as trustee for all the parties interested in the said premises, and guardian for all the infants interested therein, to be by him invested on bond and mortgage, on unincumbered improved real estate of double the value of the money loaned thereon."

William M. Tallman, the defendant, was sworn on his own behalf, and testified that he had no interest whatever in the real estate in question; he was acting after his executorship had ended, as agent for his sisters, who were the devisees, and to look after the property; his account as executor had been settled up before any proceedings were commenced by Mr. Bowman, which Mr. Bowman understood; corroborated Mr. Bowman's statements in reference to the first interviews respecting the proceedings to be had under the statute for a sale; did not make any agreement with plaintiff to pay any costs or expenses of the proceeding himself; there was no definite agreement made between them at any time that he recollected; recollected speaking to plaintiff frequently during the time the case was pending, that he wished plaintiff to make preparations for his own costs in the matter, but so far as agreeing with him, or making it a personal matter, did not recollect

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of making use of an expression in the matter, nor did he know why he should. The matter was freely talked over between them, plaintiff advising and suggesting, and defendant acting under his advice and by his direction; wishing, as a matter of course, to do it at the least expense, and with the least delay for the heirs. Defendant wished him to take any means he knew best, that would bring about the desired result in the earliest and best way; defendant did not control the matter, but left it with plaintiff; defendant was not a lawyer, but a merchant. Plaintiff never evinced any doubt about his success. First learned there was doubt after the purchase by Wintjen, and he refused to take the title; that was rather passed over, because we supposed there were other parties ready to give more, and it was not taken into much consideration. Defendant received some of the purchase money from Wintjen, and afterwards, through the advice of Mr. Bowman, he returned it; this amount was returned without interest; the amount received from Wilson on his purchase was returned to him with interest. The amount of the assessment on the property was about \$1620, with twelve per cent interest after confirmation; settled and paid that claim after the final proceedings in partition. Mr. Bowman first made his claim against defendant personally, in regard to this proceeding, after the property had been sold, and defendant had received the money; defendant felt anxious to settle the amount, but wanted to know how he could pay it out of the fund he had received; Mr. Bowman gave him to understand that he could pay the bill and account for it, and the court would allow it; defendant did not consider that satisfactory; he wanted the thing settled at the time; if there was anything to pay he wanted to pay it, for he had the money of the estate, and wanted to put it out on interest under the decree; Mr. Bowman said he could pay the bill and run the risk himself; that risk defendant did not wish to run; he was willing to pay the claim if he could, out

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of the estate; Mr. Bowman could not assure him that it would be allowed out of the estate; never expressed any willingness to pay the claim out of his own pocket; never had any understanding or agreement with Mr. Bowman that defendant should pay the claim out of his own pocket, irrespective of the estate; never recollect of giving Mr. Bowman any such promise or assurance. The amount of the bill was then put in evidence.

Edward DeWitt, was sworn as a witness for defendant, and stated that he was a lawyer; that some time in the fall of 1863, defendant called upon him with a decree in the partition suit, appointing him trustee in this fund, and also brought him a bill of Mr. Bowman, which had been given in evidence; defendant desired to know whether he was authorized by the decree to pay that bill, or whether he would be justified in paying the bill out of the funds; after an examination of it, witness told him he was not. The money was invested in bond and mortgage in the name of Mr. Tallman, as trustee, under the decree in partition; the mortgages were made to him and held by him in a fiduciary capacity; Mr. Bowman had called on him in regard to his bill of costs, and witness informed him that he was endeavoring in his mind to devise some plan by which he could be paid out of the fund, if he was entitled to it; witness' inquiry was, whether he could be paid out of the trust fund; he found that the payment could not be made out of the decree, and he informed Mr. Bowman that he did not discover any manner in which he could be paid out of the fund; there was no provision in the decree, and unless the decree was modified in some way, it could not be done. On *cross examination*, stated that he did not know that there was any claim against Mr. Tallman personally, upon the matter, until Mr. Tallman brought him the complaint in this action. Witness procured the investment and loaned the money for Mr. Tallman, under the decree; there were two separate loans, and checks for the separate

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amounts were given by Mr. Tallman; the bonds and mortgages were drawn under the direction of witness, in his office; witness described Mr. Tallman as trustee, as he thought that was the proper way to draw the papers; he had no instructions except to do what was necessary to put out the money correctly; Mr. Tallman has entire control of the investment, and can receive the money when it becomes due, and satisfy the mortgages without any action of the court, but Mr. Tallman could not release the mortgaged premises; if he had invested in his own name, he would have taken the risk of the security; he has no legal power, except as the decree gives it; he is still subject to the control, with regard to that money, of the supreme court.

The testimony here closed, and the defendant on several grounds, moved to dismiss the complaint, which motion the court denied, and the defendant's counsel duly excepted.

Defendant's counsel requested the court to charge the jury, that the defendant is entitled to recover against Mr. Bowman, the money that has been paid in the worthless proceeding, by the defendant to Bowman. The court refused so to charge, and ruled that the only question to be submitted to the jury is, whether Mr. Tallman intended to make himself personally liable, and whether Mr. Bowman so understood him. To which the defendant's counsel duly excepted. Counsel for the defendant then further requested the court to charge the jury:

I. That the defendant is not liable, because he is trustee of the fund in the partition suit.

II. Nor is he liable, unless the jury believe that he made an agreement with, or intended to make the plaintiff believe, and he did believe and understand, that he would be personally liable to the plaintiff for his costs and services in the proceedings to sell, and in the partition suit.

III. Nor is he liable, if the parties to the proceedings would not be, on account of their being against law, and

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worthless to accomplish the purpose intended to be affected by them.

Which third request the court refused to charge, and the defendant's counsel duly excepted.

IV. That the decision of the supreme court, holding that the proceeding to sell the real estate was unauthorized by the statute, must be taken as the law of this case, and as establishing that those proceedings were against law, and worthless to accomplish the purpose intended to be effected by them.

Which fourth request the court refused to charge, and the defendant's counsel duly excepted.

The court charged the jury as follows: Gentlemen, as I have already remarked, much of the discussion of the counsel on each side has been addressed to a branch of this case, which I announced some time since I should withdraw entirely from your consideration. Whether Mr. Bowman was right or wrong in the course which he pursued, is a question of law, addressed to the consideration of the court, and is therefore one with which the jury have nothing to do. For the purposes of this trial, I have already decided that Mr. Bowman was right in the course which he pursued; or, in other words, that he was not so far wrong that he would be deprived of compensation for the services which he performed. (To which defendant's counsel duly excepted.) You will, therefore, address your attention to the only question which I deem it proper to submit for your determination. You will inquire whether Mr. Tallman employed Mr. Bowman to perform the services for which this action is brought, and whether he, (Tallman,) agreed to pay for those services. If you find upon the evidence that Mr. Bowman was so employed, and that Mr. Tallman so agreed, then the plaintiff is entitled to your verdict for the amount claimed by him. (To which defendant duly excepted.) In determining this question of employment, you must believe that Mr. Bowman understood that Mr.

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Tallman intended to make himself personally liable; for if Mr. Bowman knew that Mr. Tallman was acting for others in respect to a matter in which he had no interest, then, in the absence of an express contract to pay, the defendant would not be liable. And, further, if you believe that Mr. Tallman did not intend to make himself personally liable, but that he intended the owners of the property should pay, and Mr. Bowman so understood it, then the defendant is not liable. Although what I have already said makes it, perhaps, unnecessary, it is, nevertheless, proper to say, that the defendant is not liable in his capacity either as guardian for the infants in applying for the sale of the real estate, nor as trustee in the partition suit. He has no control over the funds in his hands, and would have no right whatever to appropriate any portion of them in payment of this bill. He can only be made liable upon his personal contract, express or implied. You will, therefore, address your attention to the single consideration, whether upon the evidence, you are satisfied Mr. Tallman did employ Mr. Bowman, and whether Mr. Bowman so understood him. Mr. Bowman says that Mr. Tallman called upon him, in the first instance, to ask his advice in respect to raising money on the property by mortgage, to pay off the assessment; that he informed Mr. Tallman he could not mortgage the property. Mr. Bowman then spoke of proceeding in the supreme court by petition, and also of a partition suit. He testifies that the defendant frequently said to him that he would have to pay the bill; that he said this when speaking of the difference in the expense between a partition suit and the special proceeding; that he again spoke of it, when speaking of the appeal from the order made by the special term, saying if they were not successful it would be hard for him to pay. This is the substance of the testimony, introduced on the part of the plaintiff, of the employment by Mr. Tallman, and is his view of the personal liability of the defendant. Mr. Tallman, however, denies substan-

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tially all this, and says that he made no agreement whatever to pay any part of the costs or expenses of any portion of the proceedings. Had the proceedings which were instituted by petition been successful, there is a provision of the statute for the payment of costs out of the proceeds. The infants became wards of the court, and the court has power to direct the payment of the costs and expenses out of the fund. But the proceeding was not successful, and consequently no direction of the kind could be made. But it is proper to call your attention to the fact, as bearing upon the question, whether it was the intention of Mr. Tallman to become personally responsible. There is also evidence of an express promise to pay; Mr. Bowman testifies that after the determination of the suit, Mr. Tallman promised to pay the bill. This, however, is contradicted by Mr. Tallman, who testifies that he declined to pay the bill. He says, "I asked how I could pay the amount, as the decree did not direct me; I was willing to pay him, if I could pay out of the estate; I never offered or promised to pay it out of my own pocket." If I have made myself understood, it is not necessary to refer further to the testimony. The question of fact for you is a simple one to determine.

The jury thereupon found a verdict for the plaintiff for \$1,411.06. The defendant's counsel thereupon moved for a new trial, on the minutes of the judge, and the court denied the motion.

From the judgment entered by the plaintiff on this decision, the defendant appealed to the general term.

WM. CURTIS NOYES, *for defendant, appellant.*

JOHN E. PARSONS, *for plaintiff, respondent.*

By the court, McCUNN, Justice. This is an action brought by the plaintiff against the defendant, to recover the sum

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\$1,341.18, for professional services rendered as an attorney and counsellor at law.

The complaint is in the usual form, setting forth that by reason of certain retainers on the part of the defendant, he, the plaintiff, performed certain professional services as an attorney and counsellor at law, and that he is justly entitled to recover a fair compensation therefor.

The answer does not deny the rendering of the services, nor the value thereof, but sets up as a defence, a want of retainer of the plaintiff on the part of the defendant, and avers that the alleged services were performed for other parties, and when so performed were entirely worthless; and charges the plaintiff with a want of knowledge of his professional duties, and that owing to such want of knowledge and neglect on his part, he is not entitled to recover.

On a careful examination of the case, I think there are but two questions for the court to consider.

1. Was there such a retainer or an agreement on the part of the defendant, as would entitle plaintiff to recover in this form of action? And

2. Is the charge of professional ignorance sufficient to preclude such a recovery as claimed?

It is a well established elementary principle of law, that the party employing an attorney or counsel to perform any service in his professional capacity, in the absence of a special agreement to the contrary, is personally responsible for any such services rendered. (*Wilson* agt. *Aaron Burr*, 25 *Wend. R.* 386; 2 *Shaw R. marginal reference*; 2 *Chitty's Plead.* 69, and note *d*; *Hill* agt. *Tucker*, 1 *Taunt R.* and 5 *Taunt. R.* 46.)

The general rule is, that the party employed looks to the employer for payment, and where a trustee employs an agent in the execution of his trust, such agent must look to the person employing him individually, for his payment, and can have no claim on the trust fund (*Noyes* agt. *Blake-man*, 2 *Seld. R.* 580).

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Whether Tallman had or had not in this case authority to make an agreement with plaintiff is immaterial; that was a question between Tallman and the heirs, and could not in the slightest degree affect the plaintiff's claim; moreover, the parties for whom defendant was acting were minors and non-residents of the state. The defendant was the general agent of the property, and acted for all the heirs. That he had previously been a client of plaintiff, and employed the plaintiff to do business for the infants and non-residents who were irresponsible parties, without suggesting or agreeing not to become individually responsible for the same, or without notifying the plaintiff he would not be responsible, and this taken together with the fact that defendant controlled the entire business, funds, and all the other concerns of the estate, warrants me in concluding that the defendant is clearly responsible.

I find on examining the case, that the defendant himself even agreed to pay plaintiff out of the trust funds, when he obtained the same, and in this there is a good and valid promise, when there was a strong moral obligation to pay before.

The theory that a promise, though the party making the same may not be legally bound, can be supported by a moral obligation, is not a modern principle of law.

It has long been established that where a person is morally and conscientiously bound to pay a debt, though not legally bound, yet a subsequent promise will give a right of action (*Lee agt. Muygeridge*, 5 *Taunt. R.* 46).

I am clearly of opinion that the learned justice who tried the case would have been justified in taking the question involved entirely from the jury, and directing a verdict for plaintiff for the amount claimed. He, however, left the question to the jury, as to whether Mr. Tallman employed the plaintiff individually or not, and whether he agreed to pay for such services; and inasmuch as the jury found only such a verdict as the court would have directed,

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the defendant has sustained no injury by the ruling of the court.

There was no conflict of testimony as to the fact that defendant personally employed the plaintiff, without any lawful authority to bind any one but himself, and there being no dispute about the rendering of the services, or the value of the same, this disposes of the first proposition.

The remaining question to be disposed of is, whether the plaintiff was right in advising the proceedings first undertaken, to sell the property under the statute; or if not right in that respect, whether he was so far wrong in such advice as to preclude him from recovering in this case?

It has been suggested that however clear the power of a court of general equity jurisdiction would be under the circumstances disclosed in this case, to sell the property in question, yet the proceedings which were resorted to were not in an action; were solely authorized by statute, and that such statutory provisions must be strictly followed, or the sale will be void.

As to this I concur; moreover I hold that the authority must be found in the statute, but I think the statutory provisions as applied to the case are clear and ample.

It is conceded by all that the statute was intended to furnish a cheap and prompt mode of selling infants' estates, where such sale is necessary.

If the statute did not apply, it failed of its object, in a case calling most pressingly for its action.

But the statute did not fail. The statute expressly provides for selling interests of all infants who were seized. All the infants who were seized, applied for the sale, and I think the court to whom the application was made, was bound to sell without hesitating upon the objection, that if they did not sell, other interests might hereafter spring into existence. This was an additional reason for prompt action, in order that a just, necessary and beneficial sale might not be delayed or prevented.

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The infants before the court (in connection with owners of life estates) held and owned for the time being the whole estate, and that was sufficient under the statute to authorize the sale. The interests of the infants involved in this case were not extraordinary or uncommon.

The will under which the estate was devised, contained no extraordinary provision, and none whatever which was violated in the sale. Such cases seem to have been expressly contemplated by the legislature, when they provided for the preservation of the proceeds of the sale as "real estate," to which the interests of unborn children will attach, and not to the real estate sold; public policy forbids any other course in such a case. Supposing the theory to be correct, that this property could not be sold for the purpose of paying this assessment, the entire estate would have been in jeopardy, perhaps lost to all the parties concerned. Moreover, the necessity of such a sale in this case has not been disputed.

It has not been argued, nor does it appear that there is any substantial difference between an application for sale under the statute and a partition sale, and the court in case of *Mead agt. Mitchell* (3 *Smith's N. Y. Rep.* 216), expressed the opinion that a sale in partition binds after-born children on principles of equity independent of the statute. (*Cheeseman agt. Thorn*, 1 *Edward C. R.* 630; *Wells agt. Slade*, 6 *Vesey R.* 498; *Baker agt. Lorillard*, 4 *Comst. R.* 257.)

If the interest of children in existence attach to the fund in court as real estate, most certainly can the vague interest of unborn children attach to the fund in court as real estate.

I hold that a sale of the estate under the statute would have been a sale of the whole interest, entirely freed from the danger of any interest thereafter, and which would follow the estate where it lawfully had gone; that is to the fund in court as real estate, to be preserved for just such contingencies (7 *Paige's R.* 185).

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It would be absurd to think that a property of this kind could be liable to extinguishment by this assessment, when we have the parties in court who held the whole estate, and could not dispose of any portion of the property for the purpose of preserving the rights of all interested.

If the contrary was the rule, how long then must this estate continue inalienable? Infants unborn are not seized, hence courts cannot sell their interests, because such interests do not exist; they can sell only interests existing.

If a child should be born, it will be vested with the interest in the share substituted for real estate, and held by its co-heirs.

The whole interest must exist somewhere, and this being the rule, it is of course subjected to legal control, and the reason why the interest of an unborn child cannot be sold, or why it cannot have a guardian appointed, is because there is no such interest in existence.

I repeat, however, that if such unborn infants have such an interest as infants in existence, not only are they identical, but they demand the interposition of the court, especially in such a case as this, where without such interposition the interests of all must perish.

The counsel objecting to the title of the sale of the property under the statute, show no reasonable grounds for such objections, and the law deems every one satisfied when he shows no such reasonable grounds. (*Baker agt. Jones*, 2 *Car. & P. R.* 743; *Perkins agt. Wash. Ins. Co.* 4 *Cov. R.* 645.)

The opinion of the learned judge at supreme court, special term, touching some of the points in this case, does not in the slightest degree impair my belief that the court of last resort would have compelled the purchasers to receive the property under the order of sale made by the court; nor does it shake my opinion that a sale under such an order was proper and sustained by law; and I think the supreme court at general term must have considered the

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interest involved of but little importance from the fact that I find the questions were passed upon by the learned judges of that bench without a single expression of opinion from any of them.

Notwithstanding the decision of the supreme court, I am still fully of opinion that the advice given by the plaintiff to the defendant was proper, and that the learned justice who tried the case below was justified in holding that the plaintiff was right in the course which he pursued, or at least that he was not so far wrong that he should be deprived of a fair compensation for his services.

The judgment below should be affirmed with costs.

ROBERTSON, C. J. The answer in this case sets forth at length the proceedings taken by the plaintiff for the sale of certain real estate devised by the father of the defendant, the decision of the supreme court against the sufficiency of one, the abandonment of another, and the success of the third. It also makes a separate submission of certain questions apparently as matters of law, one of which is, that the plaintiff is not entitled to recover for services in the nugatory and useless proceedings set forth in the complaint, which are the same as those set forth in the answer. It does not contain any allegations that the worthlessness of such proceedings was caused by any incompetence, ignorance, or neglect on the plaintiff's part, or that he might with due diligence have ascertained that the advice given by him on which such proceedings were taken was erroneous, or that the contrary advice would have been free from any reasonable doubt by any prudent and skillful member of his profession. The main defence on the trial was, as alleged in the motion for a dismissal of the complaint, pursuing the theory of the answer, that the services of the plaintiff were "worthless," and in the requests to charge the jury, "worthless to accomplish the purpose intended to be effected by them." What such purpose was, was not stated. The point of law intended to be thus presented by the answer,

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motion to dismiss the complaint, and request to charge, was simply because the statutory proceedings taken by the plaintiff was in law ineffectual to accomplish the purpose for which he was alleged to have been retained to take it, or was made so by the decision of the supreme court at special and general terms, in such proceeding, the plaintiff is not entitled to recover. The principle of professional incompetency and negligence carried to that length, I think cannot be sustained. There is no implied agreement in the relation of counsel and client, or in the employment of the former by the latter, that the former will guarantee the success of his proceedings in a suit, or the soundness of his opinions, or that they will be ultimately sustained by a court of last resort. (*Lamphor agt. Phifos*, 8 *Car. and P. Rep.* 475.) He only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence and skill, would commit. (*Montrion agt. Jeffreys*, *Ky. and Mo. R.*, 317; *S. C.*, 2 *Car. and P. Rep.*, 113.) It is not enough that doubts may be raised of the soundness of his opinion or correctness of his course, unless they are accompanied by the absence of all reasonable doubts of the propriety of an opposite course or opinion in the mind of every member of his profession, of ordinary skill, sagacity and prudence, caused by a decisiveness of reason and authority in its favor. (*Kemp agt. Burt*, 4 *Barn and Ad. R.*, 424.) The practice of the law in reference to the right of compensation for professional exertions, although dependent on the exercise of intellect and study as its instruments, is subjected to the same rules as any other employment, even where the implements are of a more material kind, and not to any of either greater or less stringency. On the one hand, practitioners are bound to possess the skill and exercise the diligence and attention common to prudent members of their profession; and on the other, they are released from all liability as to consequences which, considering the fallibility of human reason, must necessarily

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be sometimes unforeseen. They are only chargeable with utter incompetency or want of ordinary care in a particular case; therefore, when after using proper diligence, no member of the profession of ordinary skill and capacity could entertain a reasonable doubt of the propriety of a contrary view and conduct. If the facts are undisputed, the court can determine as matter of law, whether in view of authorities attainable by proper research any doubt in regard to the law is reasonable. These views are rather sustained than opposed by cases in which attorneys have been denied compensation for services, even in an action or proceeding properly begun, but rendered worthless by the mode of conducting them. (*Montrion agt. Jeffreys, ubi sup.*; *Hill agt. Featherstonhaugh*, 7 *Bing. R.* 769; *Duncan agt. Blundell*, 3 *Stark. R.* 6; *Hopping agt. Quin*, 12 *Wend. R.* 517.)

The learned judge before whom the action was tried, instructed the jury that the correctness of the course of the plaintiff was a question of law, and informed them that he had already in the course of the trial held that the plaintiff was not so far wrong as not to be entitled to compensation for the services performed, to which an exception was taken. He also refused to charge, as requested, that the plaintiff's proceedings were worthless to accomplish the desired purpose, whatever it was, or that the decision of the supreme court must be taken as establishing such worthlessness. In such instructions and charge I think he was correct; both because it is not the mere worthlessness as a fact, but only an argumentative one, founded on the failure and abandonment of the proceedings and the adverse decision of the supreme court, neither or both of which would in any view of themselves establish in law such worthlessness of the proceedings, as to deprive the plaintiff of compensation. I have not the slightest doubt of the correctness of such decisions of the supreme court if they are necessarily open for examination in the case. The

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than "one of the same nature with that which they had in the property" sold.

A very cursory examination of the statute itself will suffice to show, that there is not another expression in it, which looks to the sale of any other interest but that of the petitioning infants, who are the only applicants and parties to the proceedings. Its first section (§ 170), defines the persons who are to apply, as infants seized of real estate; the object to be attained is a sale or other disposition of their property; the mode of application by petition by a next friend or guardian, implying living persons; and the mode of disposition is submitted to the discretion of the court. The person whom the court appoints to make such disposition, is made special guardian not of the proceedings but such infants (that is the petitioners), to whom he is to give a bond for the performance of his duties. A reference which is then ordered, is a summary inquiry not into the propriety of a sale, but "the merits of the application." (*Id.*) The considerations by which the court is to be governed in directing any disposition of the estate are there prescribed (§175). Those are either the necessities of the infant petitioners in reference to their support and education, or else their interests in reference either to the exposure of the premises in question to waste and dilapidation, or their unproductiveness, or other "peculiar reasons or circumstances" (§ 175), and the court is not authorized to sanction any disposition except as is required to meet the exact cases. A mortgage or a lease is authorized equally with a sale, if answering the desired purpose. In such a case, the court clearly is not to act as a court cutting off contingent remainder-men as by a fine and recovery, which may not be necessary, and clearly would be improper, in order to benefit the first takers (*Cochran agt. Van Surly, 20 Wend. Rep. 375, per WALWORTH, Chancellor*), but as the representative of the legislature, as *parens patriæ* (*Id. p. 373*), as in the precisely analogous proceedings, where

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infants or others, *non sui juris*, hold estates on joint tenancy or in common (2 R. S. 330, §§ 86 to 91), except that their exposure to the expense of a partition suit is made a sufficient necessity.

The court is not authorized to inquire into, or required to protect the interests of contingent remainder-men in the disposition it may make. After the disposition ordered is made by the guardian, the infant applicants alone are made expressly wards of the court; any surplus to be invested is for their interest alone (§§ 178, 179). And finally, no greater effect is given to the conveyance by the special guardian than to one executed by the petitioning infants when they had attained their majority. Even the protection of a disposition of the premises contrary to the provisions of the instrument by which the title was acquired, refers to such acquisition by the infant petitioners alone. The statute speaks throughout, only of the "estate" of the infant applicants and their "property," and says nothing of land, except in regard to leases, or of the title to, or fee of it. Even the restriction of the 180th section is only upon infants whose "real estate" is sold. If the statute gives the authority to pass the estates of contingent remainder-men, it makes no distinction between the living and the unborn, infants and persons of full age. The living contingent remainder-men would be as much cut off by such a sale as unborn infants. Besides, where are such contingent unborn remainder-men to look for protection to their interests? The special guardian's bond is not to them; he is not the protector of their rights. The first takers are entitled to receive the proceeds of the disposition on coming of age, since the court cannot determine what proportion to keep back; and if the contingent remainder-men are not then born, they have nothing afterwards to look to but the responsibility of those who have received such proceeds. Such a proceeding, in case the interests of contingent remainder-men are cut off under a sale pursuant to the

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statute, would clearly be taking the property of one to benefit another. There is a wide distinction between such a proceeding for the benefit of a living first taker without regard to other interests, and the representation by the first taker of all future contingent remainders where their common interest is assailed or required to be protected (*Story Eq. Pleadings*, §§ 144 to 147).

In partition suits, the rights of copartners, joint tenants, or tenants in common, to sever their interest, is the sole ground of such representation (*Wells agt. Slade*, 6 *Ves. Rep.* 498), and a sale is only authorized when a partition is impracticable, and the court may protect the interests of those represented by retaining the whole shares. The whole question in such proceeding is not one of right, but expediency. It has none of the characteristics of such fictitious actions as "fines and recoveries," invented to unshackle the lands from intricate impediments to alienation. Indeed, the plaintiff himself seems to have perceived the distinction just noted, when he speaks in his testimony of "the statutory proceeding not being in the nature of an adverse suit."

I have in the preceding considerations assumed what seems to have been heretofore assumed by every one who has had anything to do with the proceedings set out in the complaint, and as is alleged in the answer, not only that the infant petitioner who had survived her mother had a vested interest in the land, but also the others, whose mothers were living; but I can find no warrant for it in the eighth clause of the will of the grandfather of such infants (Wm. Tallman, Jr.), which is the only part before us. It contains a reference to a previous and subsequent "bequest," the former to his wife, and the latter to three of his daughters, whose names are not given; but we are not informed of the nature or terms of either. It first "gives, devises and bequeaths," a residue of personal estate, the premises in question, and other lands, subject to the

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prior bequest to his wife, and the payment of such subsequent one to the three daughters. It then proceeds as follows: "All which bequests are given to them during their natural lives, in equal proportions, share and share alike, and after their decease, to their children, the child or children of each to take the share of their mother," but concludes by saying, "and in case any of my said daughters should die without lawful issue, then * * * the portion devised and bequeathed to such daughter shall be divided between the remainder of my children, in equal portions, share and share alike." I am unable to perceive how such a clause creates a remainder in any grand-child, if its mother should have descendants, but no children surviving her. To effect such a construction, considerable violence must be done to its language, while words of established different significations used in juxtaposition, must be presumed to have been employed to mean the same thing. Thus, for such purpose, not only must the word "bequests," when referring to some gift of the testator, in which a remainder to children is created, be so far wrested from its legitimate meaning as to include devises; but in order to be applied to any devise in the will, the employment of the same word in its ordinary sense, immediately precedently to which its accompanying relative pronoun grammatically refers, must be disregarded and overleaped without the slightest necessity or justification. So, too, as the statutory definition of the phrase "dying without issue," is dying without heirs or descendants of the first taker surviving him (1 R. S. 724, § 22), the remainder over to all the testator's children could not therefore take effect, if there should be descendants of any of his daughters living at the time of their death, although their children might all be dead; yet the remainder in "bequests" spoken of was given to children only, and not to issue or descendants. So that if such remainder over were to take effect on the same subject as the first remainder, both pro-

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visions would fail if there were descendants but not children of the first takers living at the time of their death. No different result can be obtained, except by construing "children" to mean "issue," which is plainly forbidden both by the meaning of the word, the contrast in its use, and the insertion of the words, "their mothers."

If the bequests to the wife and three daughters of the testator, and the remainder to grand-children, be laid out of view, and the last sentence left to operate as a conditional limitation over on the first devise and bequest only, the meaning is clear. Such devise would create a fee in the four daughters named (1 R. S. 748, § 1), subject to be cut down to a life estate, in case of leaving no descendants (1 R. S. 724, § 22), surviving them, and their interest would then fall back into the testator's estate, to be re-divided by the same clause absolutely among his other children; while the special bequest would remain a legacy to the three daughters for life, with remainders to their children alone, opening to let in any afterwards born. The change of the term "share," if applicable only to an interest in a collateral legacy to three daughters to "portion," as applied to the interests given to four, in the bulk of the testator's property, as well as the contrast of the whole language of the two remainders, is very significant. This construction seems to me so consistent with rules of grammar, and so natural and obvious, that I am somewhat astonished that in all of the legal proceedings in regard to such premises, it should have been overlooked, if not knowingly disregarded for other purposes. As the other construction, which was actually applied, only took from the mother to give to the children, it was not, perhaps, unnatural that it should have been adopted without much inquiry.

But as regards the value of the plaintiff's services, such construction is material, because a conveyance by the testator's daughter and defendant, with one by the special guardian of the infant petitioner who had survived her

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mother, and thus inherited the interest devised to her, would carry a complete indefeasible title to the whole estate of the testator in such land. The special proceeding was then of use, and even indispensable. And although the plaintiff may have failed to present the proper views to the supreme court, in his argument before it, for any cause whatever, that would only affect his right to compensation for such argument, but not for the steps taken in the proceeding.

Independently, however, of the question of the construction of the statute or will in question, the plaintiff's proceedings would not, in any event, have proved entirely unprofitable; the estate of the other infant petitioners, whatever it was, might have been sold, as well as that of the petitioner who had survived her mother. Neither the order of the court nor the contract of the special guardian is before us. We cannot, therefore, determine whether the latter contracted to convey more than he had authority to dispose of. At all events, a good sale might possibly have been made, and the assessment paid, which was threatening to swallow up the whole value.

The defendant does not appear, even by his own statement, to have relied upon any express assurance by the plaintiff that a statutory proceeding would carry the whole title to the land to a purchaser. The court might have thought proper to order only a mortgage to raise enough to pay off the assessment. According to the statements of both parties, cheapness, expedition and the union of all parties, seem to have entered the resolution to take the proceeding under the statute.

The defendant continued to retain the plaintiff to act for him after the refusal by the first purchaser to take, and even after the decision by the supreme court, at both special and general terms, and employed him to carry through the final successful action in partition. He was only surprised at the amount of the bill, offered a less

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amount, and was willing to pay it if he could out of the estate. All this is hardly consistent with the supposition that the plaintiff had not done what he undertook to do, or had given assurances which were not borne out by the decision of the court, and the abandonment of two sales in succession, on the ground of a defect in the proceedings. There cannot, therefore, well be said to have been such conclusive evidence of the worthlessness of the proceedings to accomplish every object desired, as to require the court to have given the positive instruction asked for on that point. The proceedings may have been an experiment. There is no question before us as to the amount due, if any thing is due. Another defence set up in the answer was, that defendant had no title or interest in the real estate in question, and in retaining the plaintiff the defendant acted solely as agent of the owners, and so notified the plaintiff; and it was understood that the latter should be compensated for his services out of the proceeds of the sale of such estate. On the trial, the learned Judge before whom the same was tried, instructed the jury in substance, that if they found from the evidence that the defendant "employed" the plaintiff to render the services for which this action was brought and agreed to pay him therefor, he was entitled to a verdict for his claim. To which an exception was taken. After the interposition of such exception, the judge proceeded to explain such instruction by a direction to the jury, that in determining such questions of employment they must believe that the defendant "intended to make himself personally liable," and that he would not be so liable without an express contract to pay, either if the plaintiff "knew that he was acting for others in a matter in which he had no interest," or "if he did not intend to make himself personally liable, and the plaintiff so understood it." No exception was taken to the instruction as thus qualified. It is to be presumed the defendant's counsel was satisfied therewith, as being a compliance with

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his second request to charge, having taken no exception to the refusal of such request. The only proposition involved in such request was, that the defendant was not liable unless he either "made an agreement with the plaintiff, (to become personally liable,) or intended to make him (the plaintiff) believe, and he did believe and understand that he, (the defendant,) would be personally liable."

The instruction, as given with its qualifications, substantially embraced the proposition so requested to be put to the jury; at all events, it was correct, for undoubtedly an express promise to pay by the defendant would bind him, even although the plaintiff knew him to be acting for others, and that he only intended to bind them. And if the defendant, with intent to make himself personally liable, the plaintiff understanding such to be his intent, employed the latter and agreed to pay him for the services to be rendered, he is clearly liable. "*Employment*," (*Monell agt Marshall*, 25 *How. R.* 425,) and "*Retainer*," seem to imply a personal obligation. (*Hill agt. Tucker*, 1 *Taunt. Rep.* 9, *per MANSFIELD*, *Ch. J.*; *Wilson agt. Barr*, 25 *Wend. R.* 386.) If the defendant was acting as trustee and not as an agent, he was responsible in the first place at all events as principal. (*Noyes agt. Blakeman*, 2 *Seld. Rep.* 580.) Indeed, in regard to attorneys, the presumption as to the person to whom the credit is held to be given, seems to be reversed. (2 *Chitty Pld.* 69, *n. d.*; 2 *Sher. R.* 422; *Wilson agt. Barr*, *ubi sup.*; *Hill agt. Tucker*, *ubi sup.*) Under the charge the jury must be presumed to have found that there was an express contract made by the defendant to pay, intending to make himself personally liable, and giving the plaintiff to understand that he so intended. And the portion of the plaintiff's testimony alluded to in the charge was sufficient to sustain it. No question of fact was raised in this case, by proof by experts, of the views which members of the plaintiff's profession would entertain of the correctness of his opinion, if given, that the statute gave the court jurisdiction to order

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a sale of the contingent interests of others not applicants under it as well as those of such applicants, or in other words, bind them by the disposition made.

Not being able to find, therefore, any errors in the charge of the learned Judge, or of his refusals to charge, which seems to be the principal subject of exceptions, or the reception or rejection of evidence, I concur in affirming the judgment.

SUPREME COURT.

HOSEA NICHOLS, appellant agt. GEORGE W. BAIN, respondent.

Where a deed of land is offered in evidence by the plaintiff in a *justice's court*, to prove the mere fact of the purchase of the land, as evidence of the performance of a condition precedent to defendant's liability upon a written instrument which is the foundation of the action, it is *admissible*, although the title is disputed by the defendant as insufficient to convey the premises. Its admission does not draw in question the title to the premises so as to oust the justice of jurisdiction under section 59 of the Code.

Fourth Judicial District, General Term, July, 1864.

Before POTTER, JAMES, BOCKES and ROSEKRANS, Justices.

THIS action originated in a justice's court and was brought to recover \$25 subscribed to a paper, of which the following is a copy:

"In consideration of \$1.00 to us in hand paid, the receipt of which is hereby acknowledged, and for other good and sufficient reasons, we hereby agree, severally, to pay to Hosea Nichols, or his order, the sum set opposite our respective names, &c., on condition that said Nichols shall purchase the mill property and water power in the village of Fort Miller, owned by the heirs of the late Barent and John R. Bleeker, &c., and improves and brings said water power into use."

The complaint, after setting forth the said agreement,

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averred due performance of the condition precedent. The answer denied all the allegations of the complaint.

On the trial, after proving and reading the foregoing instrument, the plaintiff offered in evidence a deed of the water power property at Fort Miller to the plaintiff, from the heirs of Barent and John R. Bleeker, which was objected to by the defendant on the ground that it brought in question the title to real estate, which title the defendant disputed and ousted the justice of his jurisdiction. The justice sustained the objection and on the defendant's motion dismissed the action for want of jurisdiction. On appeal, the county court sustained the ruling and affirmed the judgment. The plaintiff has appealed to this court.

JOB G. SHERMAN, for plaintiff.

JAS. S. COON, for defendant.

By the court, JAMES, J. The purchase of the mill property and water power in the village of Fort Miller, owned by the heirs of Bleeker, its improvement, and bringing the water into use, were conditions precedent to a right of action on the instrument sued on. Such purchase could only be by deed, and therefore that instrument was the best, if not the only, admissible evidence of such purchase.

In averring due performance of all the conditions precedent, the plaintiff in legal effect, asserted the purchase of said mill property and water power; and the general denial in the answer necessarily put in issue that purchase, and thus plaintiff was put to the proof thereof.

The 59th section of the Code, which is a substantial transcript of 2 R. S. 237, of section 63, declares that "in actions commenced in a justice court, if it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title is disputed by the defendant, the justice shall dismiss the action, &c.

Other sections of the Code provide for dismissing the

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action where title shall be pleaded. The purpose of the statute is that a justice of the peace shall not in any case have jurisdiction to try a disputed title to real property.

But did it appear on this trial, from the plaintiff's own showing, that the title to real property was in question? It seems to me that it did not. A deed of real estate was introduced in evidence not to establish a title to land, for that was not the issue, but to show the performance of a condition precedent to defendant's liability upon the instrument which was the foundation of the action. That condition precedent was, that plaintiff should purchase certain property owned by certain heirs. And a purchase from them was a performance even though they had but an imperfect title. It was the purchase from said heirs, and not the extent or validity of their title which was the fact sought to be established by the introduction of the deed in evidence. Although I do not mean to admit that it would make any difference even had plaintiff tried to establish a perfect title.

It was said in *Main agt. Cooper* (25 N. Y. R. 184), that in all cases where deeds or paper evidences of title to real estate are introduced before a justice of the peace, he is entitled to consider the purpose for which they are introduced. If they are merely introduced incidentally to establish some collateral fact not involving any title to or interest in lands he is to receive them like other evidence.

It was in this light that the justice on the trial of this cause should have looked at the introduction of the deed. It did not put in question any title to or interest in land; the title was collateral to the main issue on trial, and therefore the deed should have been received as other evidence and jurisdiction of the cause retained.

Judgment of the county court and justice reversed.

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COURT OF APPEALS.

NOBLE agt. CROMWELL.

On a sale in *partition*, the *purchaser*, not a tenant in common at the commencement of the proceedings, cannot object to the validity of the sale on the ground that he was not made a *party* to the proceedings—he holding a deed of a portion of the premises purchased *pendente lite* from some of the heirs, defendants in the partition suit; especially where the deed expressed in terms that the conveyance was made subject to the proceedings in partition.

Any error in stating in proceedings in partition the precise interests of the parties, or the shares to which they were entitled, is quite immaterial, because the persons interested, where they are all parties to the proceeding, are concluded by the judgment.

There is no rule that requires the referee in his report of title on proceedings in partition to annex to his report a search for mortgages or conveyances, &c., affecting the title. If his report states the fact explicitly that he had caused the necessary searches to be made, and certifies what incumbrances, &c., there are, it is sufficient.

It is not necessary that the referee in these proceedings *advertise for liens*. Such notice is not necessary to be published unless by advice of the court, or it is required by some party to the suit.

September Term, 1860.

THIS was a petition by Charles Bridge, the purchaser of premises sold under a decree in partition, to be discharged from his purchase. The complaint alleged that in March, 1847, Benjamin Brooks died leaving certain real estate, which was, by his last will and testament, devised to his several children in nine parts. That the land was subject to a mortgage, which was afterwards foreclosed, and the premises in question upon the sale were bought in by, and conveyed to C. T. Cromwell (the husband of one of the devisees), for the benefit and account of all the devisees, according to the provisions of the will. That Cromwell conveyed to Harriet, the wife of the plaintiff, William H. Noble, "her undivided proportion of the premises, which was ascertained to be eleven and two-thirds per cent of the premises; and that the other devisees under said will, or those who represent said devisees, are equitably entitled,

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in the same manner, to the same proportion or share thereof," except one of the defendants, an infant, &c. That the plaintiffs "are now seized in right of the plaintiff, Harriet, as tenants in common with the defendants, of an estate in fee simple equal to eleven and two-thirds per cent, and an equitable interest for the other devisees, or their legal representatives, under and according to said will." The complaint further stated the interest claimed by the other defendants, and averred that Edward C. Bull, a party defendant, was entitled to be repaid out of the share of the plaintiffs an interest of \$1,000, and out of the share of Matilda Frye, one of the devisees, an interest of \$522.50. The plaintiffs demanded judgment for an actual partition, or for a sale, and a division of the proceeds. By the will, the testator devised one share of the premises to William H. Noble, in trust for his wife during her natural life, and to her heirs forever, subject to a life estate in the husband after the death of his wife.

The answer submitted the interests of the defendants to the court for partition, and upon the usual reference a report was made by the referee defining the interests of the parties. The interest of the plaintiffs was stated to be an interest, in the right of the wife, of eleven and two-thirds per cent. The referee certified that he had caused the necessary searches to be made, and that no creditor not a party had any lien on the premises, except a mortgagee, whose lien was prior to the interests of all the parties. An abstract of the title was set forth in the report, but no searches were annexed. The report was confirmed, and judgment was given directing a sale of the premises, and a division of the proceeds among the parties pursuant to the report; including the payment to the plaintiffs of eleven and two-thirds per cent of the proceeds, as claimed in the complaint. The sale was had under the direction of the referee, and his report of sale was confirmed. The petitioner was the purchaser at the sale. The application

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to be discharged from his purchase was founded on objections to the regularity of the proceedings in the suit.

It appeared, upon the application, that the action was commenced by an arrangement with one George Bridge, who had then a contract with several of the devisees for interests amounting to fifty-one and one-third hundredths of the premises. Pending the partition suit, this contract was assigned by him to Charles Bridge, the petitioner; and before judgment, a deed, pursuant to the contract, was executed to him by some of the defendants. This deed was, by its terms, subject to the partition action. The petitioner raised several objections to the regularity of the proceedings; among which were these: That he, the petitioner, George Bridge, and the children of the plaintiffs, should have been made plaintiffs; that the interests of the parties were not stated in the complaint with sufficient certainty; that it was not alleged that all the debts and legacies were paid, nor that there were no other incumbrances; and that no searches for incumbrances were annexed to the report of the referee.

The court at special term (*See 26 Barb. 475*), INGRAHAM J. granted the motion, unless the plaintiff within thirty days applied for and obtained an order amending the judgment in partition, by directing the share of the property in which Mrs. Noble has an interest, to be brought into court and invested; the income to be paid to her during her life; to her husband, if he survive her, after her death; and to belong to the heirs of Mrs. Noble thereafter. If so amended, the motion was denied. The petitioner appealed to the general term, where the judgment of the special term was affirmed. And the petitioner thereupon appealed to this court.

J. M. BALDWIN, *for appellant.*

CHARLES T. CROMWELL, *for respondents.*

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BACON J. After intimating an opinion that the appeal ought to be dismissed on the ground that there had been no actual determination in the court below of the questions raised by it, and that jurisdiction could not be given by the consent of parties to a *pro forma* judgment for the mere purpose of grounding an appeal, proceeded as follows : If, however, the appeal is effectual for any purpose, it must be confined to the questions made by the second and third points presented by the appellant. The first relates to the necessity of making the appellant a party to the proceedings in partition, and the second to alleged irregularities in the proceedings, by which it is averred that a good title was not offered to the purchaser.

As to the first objection, it is sufficient to say that the appellant was not a tenant in common of the premises at the time of the commencement of the proceedings for partition. He purchased from some of the parties and took a conveyance *pendente lite*, and after the statutory notice had been filed. Besides, he purchased subject to the proceedings then pending, and this was expressed in terms by a clause in the conveyance he received, and which vested in him the shares of the grantors as parties to the proceedings. By purchasing with the knowledge that he held such a conveyance, he became vested with the title of the parties to the suit in partition as well by notice of the sale under the judgment in that suit as by the conveyances; and it would be a strange proposition, if he could be heard to object to his title as defective, because, in addition to his purchase upon the sale, he had also a conveyance from some of the parties to the proceeding itself. The case of *Burhans* agt. *Burhans* (2 Barb. Ch. R. 398), decides nothing adverse to this conclusion; hence it clearly appeared in that case that the title of the person who was not made a party to the proceedings in partition occurred many years before the suit was instituted.

The second ground on which the appellant asks to be

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released from his purchase is, alleged irregularities in the partition suit. The answer to this given by Judge INGRAHAM at special term is entirely conclusive, to wit: that they do not, in any respect, affect the title of the purchaser; any error in stating the precise interests of the parties, or the shares to which they are entitled, is quite immaterial, because the persons interested were all parties to the proceedings, and are concluded by the judgment.

The objections, too, are of a light and almost frivolous character. It is said, for instance, that to the report of the referee upon the title there is appended no search for mortgages or conveyances incumbering or affecting the title. There is no rule that I am aware of that requires this to be annexed, although, doubtless, it is a common and very convenient practice to do so. In his report, the referee states the fact explicitly that he had caused the necessary searches to be made, and he certifies that no creditor not a party to the suit had any lien by way of mortgage, devise, or otherwise, excepting the mortgage of the defendant Cromwell, the amount of which he specifies.

The other objection that it does not appear that the referee advertised for liens, is equally untenable. Since the case of *Gardiner agt. Luke* (12 *Wend.* 269), the practice has been uniform in accordance with the construction which the court gave to the statute in that case, not to publish the notice unless by advice of the court, or it is required by some party to the suit. If there are no liens, the advertisement is an expensive superfluity. The report of the referee distinctly certifies that there are no such liens. It is not enough for the purchaser simply to allege the omission of an advertisement, and therefrom ask the court to infer that perchance there may be some outstanding incumbrance that may affect his title. If any such liens or facts exist, the purchaser should furnish affirmative evidence thereof, and ask to have them removed, or that he be relieved from the obligations incurred by him as such

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purchaser. Until this is done, he presents no case for the interference of the court.

The judgment should be affirmed.

SUPREME COURT.

THOMAS WATSON, appellant agt. ALBERT MORTON, respondent.

There is no authority for requiring a *copy of a summons* to indicate that the original summons was duly *stamped* with a United States revenue stamp. The copy is sufficient where there is no indication of such stamp contained on it. (*This reverses S. C. at special term, 26 How. Pr. R. 383.*)

Onondaga General Term, June, 1864.

Before MORGAN, BACON, and FOSTER, Justices.

APPEAL from the order of Justice JAMES at special term, setting aside the plaintiff's proceedings, for the reason that the copy summons served upon the defendant had no indication of a stamp having been attached to the original. (*See 26 How. Pr. R. 383.*)

L. H. BROWN, *for appellant.*

D. PRATT, *for respondent.*

By the court, MORGAN J. I think it is the usual practice to put a memorandum upon the copy of the summons as served, to indicate that the original is properly stamped as required by the act of Congress. But there is no authority which requires this to be done. Although stamping is required in England by sundry acts of parliament to give validity to a variety of instruments, it is not necessary, nor is it usual in pleadings to aver that such instruments have been duly stamped. (*See 1 Daniels Ch. Pl. & Pr. 418.*) It was never necessary to imitate the seal upon the copy of process when served. (*Chutterbuck agt. Wildman, 2*

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Tyrolhitts' Ex. Rep. 276; 3 *Chitty's General Pr.* 261.) Nor was it necessary in serving the copy, though usual, to show the original process unless demanded. (*Tidd's Pr.* 148.) The defendant cannot take it for granted that the original summons is not properly stamped to give it validity merely because the copy served takes no notice of it. The summons is required to be filed with the clerk of the court within ten days after the service thereof (§ 416 of the Code), and it can then be seen whether or not it is properly stamped. If it can be shown, however, by affidavits, that it was not properly stamped before the commencement of the action, it will be set aside on motion; and the objection will be taken by the court without a motion, whenever the fact comes to its knowledge. (*Daniels on Pl. & Pr. Supra* 1188.)

As the original summons was duly stamped in this case, the service of a copy thereof without notice of the stamp would be an irregularity, at most. It is treated as such by the judge at special term. As an irregularity, it was cured by the general appearance of the defendant; and the motion might have been denied upon that ground. (*See 1 Abbott's Dig.* p. 190, *Sub. IV.*)

In my opinion, however, there is no authority for requiring the copy to indicate that the original was duly stamped; and for this reason I think the order at special term should be reversed with \$10 costs to the plaintiff on this appeal.

Ordered accordingly.

Hasard agt. The Hudson River Bridge Company.

SUPREME COURT.

HENRY W. HAZARD agt. THE HUDSON RIVER BRIDGE COMPANY, at Albany.

Where an *injunction* is granted on ~~an~~ order to show cause, *before answer*, the defendant is not precluded on the coming in of the answer, from *moving to dissolve the injunction upon the answer*, although he appeared and opposed the granting of the injunction upon the matter of the complaint and the moving papers alone.

An *injunction* to restrain the defendants from erecting a bridge across the Hudson river at Albany, N. Y., under an act of the legislature, on the alleged ground that the proposed bridge will substantially impede or obstruct the free navigation of the Hudson river—not on the ground of the unconstitutionality of the act, should not be granted, except upon evidence reasonably clear and satisfactory that the law is about to be violated.

This case presents itself in this form: The *complaint* was verified by a party, not assuming to have and not likely to have precise knowledge of the plan or dimensions of the contemplated bridge; it averred in some respects positively, and in others on information and belief, that the defendants threaten and intend to build their bridge upon a particular plan, and of particular materials, which, to some extent was specified; and asked a full and minute disclosure from the defendants of the precise plan and model of the proposed bridge.

The *answer* was verified by a leading officer of the company, likely, from his intimate connection with the directors, and the records and papers of the defendants, to have full and accurate knowledge of the model and materials of the proposed structure, although not disclosing, as asked by the complaint, the precise plan and model of the bridge, *positively denied* that it was to be of the form, dimensions or character specified in the complaint, or *similar thereto*.

Held, that the omission of the answer to give the precise plan and model of the proposed bridge, although a matter of regret, was not sufficient to authorize the court to assume that the allegations of the complaint in that regard are substantially correct.

Held also, that the whole equity of the bill being denied by the answer, the foundation on which the injunction rested was taken away; and this, according to equity practice, is good ground for dissolving the injunction.

The general averments of the complaint, that *any bridge whatever* (except a suspension bridge), built in conformity with the other requirements of the act, would violate that requirement of the act which forbids any substantial obstruction to navigation, were met by the defendants by saying that the legislature by prescribing certain regulations as to the manner of building the bridge, have, in effect, declared that a compliance with those regulations, will exempt the bridge so far from the imputation of making substantial impediments to navigation.

Albany Special Term, June, 1863.

Hazard agt. The Hudson River Bridge Company.

MOTION to dissolve injunction restraining the defendants from building a bridge across the Hudson river at Albany.

J. V. L. PRUYN and S. T. FAIRCHILD, *for defendants.*
W. A. BEACH, *for plaintiff.*

HOGEBROOM, J. The defendants on the answer, and on affidavits and the papers in the action, moved to vacate and dissolve the injunction issued therein. The plaintiff resists the same upon a portion of the same papers, and upon an additional affidavit. On the first day of May, 1863, Judge ROBERTSON, of Rensselaer county, on the complaint in this action, and on affidavits exhibited to him, granted an order requiring the defendants to show cause before him on the 9th of that month, why an order should not be granted restraining them and their agents and servants from erecting a bridge across the Hudson river at Albany, as proposed by the said defendants, as stated in the complaint, and restraining them in the meantime. Service of the papers having been duly made, the parties appeared before him on the return day of the preliminary order. The complaint and affidavits were read on the part of the plaintiff, but no papers were read on the part of the defendants. Judge ROBERTSON then after argument on both sides, made the order—now sought to be vacated and dissolved—enjoining and restraining the defendants and their agents and servants “from erecting any bridge over or across the Hudson river, at or opposite the city of Albany, as they threaten, and are about to do, as charged in said complaint, and from erecting or constructing any bridge over said river, or any part thereof, by which any abutment, or pier, or permanent structure shall be placed in said river, or be placed over the same, unless elevated above the ordinary height at all stages of the water of the tallest masts and steam chimneys of the various craft navigating the same, or by which the free navigation of said river will be sub-

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stantially impeded or obstructed, and from placing in said river at or opposite said city of Albany, any pier, pile or abutment, for the purpose of constructing a bridge thereon, or preliminary thereto, until the further order of this court in the premises."

Upon the motion to dissolve the injunction, the defendants introduce no papers or affidavits beyond those which the plaintiff had previously used to obtain the injunction, except the answer in the action, and the affidavits of George E. Gray and Erastus Corning. And the plaintiff introduces no new or additional papers except the affidavit of Levi Smith as to the proceedings in the suit.

The plaintiff objects preliminarily that this motion cannot be made. That the defendants have been heard upon the order to show cause, and at that time resisted the motion for the injunction before the county judge, and that their appropriate remedy is by appeal from his order, and not by making this motion, which is claimed to be in effect a renewal of one formerly heard and decided. Section 225 of the Code, which declares that if the injunction be granted without notice, the defendant at any time before the trial may apply on notice, and on the original papers, or on new affidavits, with or without the answer, to vacate or modify it, gives some countenance to this objection. I am surprised to find that so far as I can discover (and so counsel upon the motion seemed to suppose), the question is not decided. But I am inclined to think the objection ought not to prevail. It was the established practice in the court of chancery that the defendant might on the coming in of the answer move to dissolve the injunction, and the answer was a most important paper upon the motion, for if it denied the whole equity of the bill, it was the general practice to dissolve the injunction. That right has not been expressly abrogated by the Code. The motion for the injunction was made before the defendants had interposed their answer, or were bound to do so. They

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resisted that motion as they had a right to do, upon the matter of the complaint and the moving affidavits alone. Upon the same papers, if the injunction had been granted *ex parte*, they would have had the right to move to dissolve the injunction without prejudice to a second motion (if that was unsuccessful), upon the coming in of the answer to dissolve the injunction. The course pursued here is in effect the same. The answer is presumed to be prepared with deliberation, and it contains matter material and pertinent to the motion, which was not before the judge on the former motion. It in effect denies the whole equity and facts of the complaint. It is also accompanied by the affidavits of Mr. Gray and Mr. Corning, designed to show the state of progress to which the plan and specifications for building the bridge had arrived when the injunction was served; the defendants' intention to build the bridge in strict conformity to the law, and the belief of the witnesses in the public importance and utility of the proposed structure. I think the preliminary objection must fail.

The defendants' motion is founded upon two grounds:

1. That their proceedings are in conformity to the act of the legislature of April 9, 1856, authorizing the construction of the bridge, and the act of April 14, 1857, amending the same; and
2. That these acts are not inconsistent with the constitution of the United States.

The plaintiff not raising the constitutional question at this time, resists the motion, and defends the injunction upon the ground that the bridge proposed to be erected by the defendants, will, contrary to the eighth section of the act of 1856, "substantially impede or obstruct the free navigation of the Hudson river."

I do not feel it in any degree necessary to investigate the constitutional question upon this motion.

1. Because it is alleged that the judges of the court of last resort, as well as those who originally heard a case

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nearly similar, asking like relief, were equally divided upon the question ; and

2. Because the plaintiff has not sought to maintain the injunction on the ground of the unconstitutionality of the state law.

The question therefore to be determined is, whether the proposed bridge will substantially impede or obstruct the free navigation of the Hudson river ? This as a question of fact, must, except so far as the legislature has itself determined the question, be determined by the evidence, having due regard of course to the principle that a work of such magnitude and alleged importance, authorised by the legislature, should not be arrested by injunction except upon evidence reasonably clear and satisfactory that the law is about to be violated. The act of 1856 (*chap. 146, §§ 1 and 8*), authorises the defendants to construct a bridge across the Hudson river at Albany, "at an elevation at least twenty feet above common tide water, so as to allow under it the free passage of canal boats and barges without masts, and with a draw therein of sufficient width to admit the free passage of the largest vessels navigating the said river, and at least two hundred feet in width, or of two draws of at least one hundred and fifty feet each, which draws shall not be obstructed by piers or otherwise, and in such a manner as to create no substantial impediment or obstruction to the free navigation of the said river." The amendatory act of 1857 (§ 1), allowed an alteration of the structure in some particulars; and authorized a draw of such dimensions as the state engineer and John B. Jervis and Oliver H. Lee, civil engineers, should determine, of sufficient width to admit the free passage of the largest vessels navigating the Hudson river, and if the bridge was constructed with one draw, then such draw to have a width of at least one hundred and eighty feet ; and if with two draws, then such draws each to have a clear width of at least one hundred and ten feet. These dimensions of the

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draws were subsequently, on the 27th of May, 1857, approved and authorized by the engineers mentioned in the act, and they gave a certificate accordingly, which further stated that such draw or draws would be "of sufficient width to admit of the passage of the largest vessels navigating the Hudson river." Although the language of the act is not in the highest degree perspicuous, I think it was intended thereby to refer it to these engineers to determine not only what would be the suitable dimensions for a draw or draws in the contemplated structure, but what would be such suitable dimensions for a draw or draws for the free passage of the largest vessels navigating the Hudson river, and that the act and the certificate taken together, amount to a legislative declaration and recognition that draws of such dimensions would furnish ample accommodations for the free passage of the largest vessels. The question then is, whether these should any longer be regarded as open questions in the courts, and whether I ought to grant or sustain a preliminary injunction, upon the ground that draws of such width would materially interfere with the navigation of the largest river craft? I am also inclined to think that the legislature have in effect declared that an elevation of the bridge at least twenty feet above common tide water (*Act of 1856, chap. 146, § 8*), would be sufficient to allow under it the free passage of canal boats and barges without masts; and I should be inclined to hesitate before authorizing a preliminary injunction founded on the idea that such an elevation was not sufficient for the craft thus specified.

We must therefore recur to other allegations of the complaint, and of the affidavits and see, if the contemplated structure will, in other particulars, violate the provisions of the act.

The complaint, among other things, alleges that the defendants are making preparations, and threaten and intend to erect said bridge upon massive stone piers, at

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least four of which (as plaintiff is informed and believes), of about twenty feet in breadth, are designed to be placed in the main channel of the river, and in the direct ordinary and necessary course of commerce and navigation thereupon—two of the piers connected with the draw or draws to be much larger—that the erection and maintenance of the bridge in the manner intended and threatened, will essentially obstruct the navigation of the river, and materially hinder the plaintiff and others in the navigation thereof; that the defendants threaten to erect and continue said bridge or some similar bridge, which will produce the several injuries thereinbefore described, and will also substantially impede and obstruct the free navigation of said river, contrary to the provisions of said charter. The complaint is verified by the plaintiff in the usual form, and some of the allegations appear to have been intended to be positive, and not merely upon information and belief, and the complaint asks the defendants fully and minutely to disclose and set forth in their answer the precise plan and mode they intend to adopt and use in the construction of the bridge.

The affidavits used in connection with the complaint to obtain the injunction, and especially those of Peters, Robinson, Scoville, and of the plaintiff, tend in a general way to support these allegations in the complaint.

The answer, referring to the allegations in the complaint that four of the piers of the bridge are intended to be about twenty feet in breadth, and to be placed in the main channel of said river, and in the direct ordinary and necessary course of commerce and navigation thereupon, and at least two of them much larger, and that the defendants do not intend to elevate said bridge materially, or any more than twenty feet above common tide water, says, that "the defendant denies said allegations and each and every of them, and every part thereof." They further deny that the erection and maintenance of the bridge in the manner

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intended and threatened by the defendants will essentially obstruct the navigation of the river. They further say, "as to the allegations in the complaint that said bridge (which defendants intend to construct) will be similar to that above mentioned (as described in plaintiff's complaint), and which will produce the several injuries thereinbefore described, and will also substantially impede and obstruct the free navigation of said river, contrary to the provisions of said charter, the defendant denies said allegations and each and every of them, and every part thereof." There are further denials that the bridge they threaten and intend to construct will cause any substantial impediment and obstruction to the free navigation of the Hudson river.

When these allegations in the answer were first brought to my notice, I was inclined to think that the denials were rather verbal and technical than otherwise; that they were designed rather to controvert the precise phraseology of the complaint, and the allegations in the complaint as a whole, as they stood connected together in a single and continuous sentence; but on examining them more carefully, and considering their character and intent, I have come to the conclusion that they were designed to meet and controvert the whole spirit and intent of the allegations of the complaint, in the aggregate and in detail, and that they reasonably bear that construction. These denials in the answer, positive in their character, and comprehensive in their scope, are verified by the oath of Mr. Fairchild, the secretary and treasurer of the defendants, and I think it reasonable to infer that they are based upon as accurate a knowledge of the real facts as the allegations of the complaint in that particular, which are verified by the plaintiff himself, who cannot be supposed to be equally familiar with the model and dimensions of the bridge which the defendants intend to construct. The plaintiff asks in his complaint a full and minute disclosure from the defendants of the precise plan and model of the contemplated

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structure. This is not given in the answer, and however much we may regret that it is not, we are not I think authorized from that circumstance to assume that the omission to give this information is sufficient evidence that the allegations of the complaint in that regard are substantially correct.

The case then stands thus : The complaint verified by a party not assuming to have, and not likely to have precise knowledge of the plan or dimensions of the contemplated structure, avers in some respects positively, and in others on information and belief, that the defendants threaten and intend to build their bridge upon a particular plan and of particular materials, which it to some extent specifies. The answer, verified by a leading officer of the company, likely, from his intimate connection with the directors and the records and papers of the defendants, to have full and accurate knowledge of the model and materials of the proposed structure, positively denies that it is to be of the form, dimensions or character specified in the complaint, or similar thereto. I do not think that the allegations of either pleading are in this particular supported by independent evidence, for although it is true that in the former cases of Sullivan and Coleman, many of the questions put by the plaintiff's counsel, and some of the admissions made by defendants' counsel, assumed or tended to show that the model and dimensions of the proposed bridge corresponded very nearly with those named in the present complaint, yet after a positive and specific denial of this fact in the answer of the defendant, especially when taken in connection with the statements in the defendants' affidavits, I am rather bound to assume that the plan of the proposed structure has been materially changed from what it was during the trial of the former suits.

The whole equity of the bill would then seem to be denied by the answer, and the foundation on which the injunction rests would seem to be taken away, and this,

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according to equity practice, is good ground for dissolving the injunction. The plaintiff, before he seeks another injunction, should obtain further and more reliable evidence of the plan and particulars of the contemplated bridge, by the examination of the defendants' officers or otherwise.

There is another ground which I understand to be assumed by the plaintiff, and which is necessary to be considered; and it is in substance this, that any form or dimensions of bridge (other than a suspension bridge) which the defendants could possibly devise or adopt, will inevitably impede or obstruct the free navigation of the Hudson river, and, therefore, that no bridge whatever can be built without violating the provisions of the charter. This is perhaps in principle the most important question in the case, and must command serious attention at this or some other time.

I doubt whether it is necessary to dispose of that question at the present time. I am not disposed to determine in advance that a bridge substantially of the model and dimensions which the legislature have in effect authorized, will necessarily and unavoidably impede or obstruct the free navigation of the Hudson river, without direct and specific evidence of the character of the structure which the defendants propose to build, and of the impediments to navigation which will necessarily result therefrom. The question will then be presented whether the legislature have not themselves adjudicated this question, and whether it is competent to overrule their decision.

It would seem to be clear that the legislature designed at all events to allow some bridge to be built. The authority to build a bridge is absolute and unqualified. It is conferred in express and unrestricted terms, and although it is declared that it must have some characteristics, as that it shall have a certain elevation, and in places a certain breadth between piers, and the general characteristics of not causing any substantial impediment or obstruction

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to the free navigation of the river, yet notwithstanding all these restrictions, it is expressly said, the defendants may build a bridge. It is not said that they may build a bridge provided they can do so without causing any substantial impediment or obstruction to navigation, but that they may build a bridge, doing it in a manner to cause no substantial impediment or obstruction to navigation. The very bestowment of the power implies a legislative conviction that the power may be exercised without substantial hindrances to navigation, and is, I am inclined to think, a legislative declaration to that effect.

The bridge thus authorized, it is evident from the terms of the act, was not expected to be a suspension bridge merely, that is, one having supports only on the opposite shores of the river, but a bridge having piers on which to rest, and draws which would admit of being opened and closed, and a general elevation for the main structure less than the height of some of the masted vessels navigating the river. Hence the bridge was not only designed to span the river, and to be supported on piers resting in part in its bed, but also as on occasion of the passage of railroad trains to be sometimes entirely closed from one end to the other. And as already suggested, we must, I think, assume as the legislative opinion, that such a bridge although presenting a material structure over the whole bed of the stream, would not of itself and necessarily, when furnished with the conveniences and appliances provided in the act, be a substantial impediment to navigation. And if such is the fair inference from the act, then it is a declaration to that effect by the sovereign power, and the question is, whether its determination is not a legislative rather than a judicial power, and being made by competent and the highest authority, obligatory upon courts as well as citizens. This is a most important and interesting question, and I forbear from expressing a decided opinion at the present time, as I think it would be premature to do so. I do

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not speak now of the constitutional question, for that turns upon different reasons, and requires the examination of a distinct instrument on the construction of which it may well be that the legislature have no right to control the courts. But in its present aspect, the question is presented whether the power we are now considering, is not in effect a legislative adjudication of a question of fact, in regard to which the people themselves in their delegated capacity have taken the testimony and decided the case, and whether there is any legal objection to their taking this course—whether independent of the constitutional restriction, they would have a right to authorize the construction of the bridge, whether it caused substantial impediments to navigation or not. It is claimed that they possess this power, and that possessing it they have chosen to impose upon the corporators certain restrictions and limitations, one of which is, that they shall not substantially obstruct free navigation. And that they have chosen to define what they regard as not being a substantial obstruction to navigation. And that they have said that a bridge with piers, at a general elevation of twenty feet above common tide, will not obstruct vessels and barges without masts; and that a bridge with a draw of one hundred and eighty feet, or with two draws of one hundred and ten feet each, will not materially obstruct the free navigation of vessels of any description navigating the river with masts.

These views derive considerable corroboration from the case of *The People agt. The Rensselaer and Saratoga Railroad Company* (15 Wend. 113). That was an information in the nature of a *quo warranto* against the defendants, calling upon them to show by what warrant they claimed the right to construct a bridge upon abutments and piers across the Hudson river at Troy. They pleaded that they were authorized by the legislature of the state of New York to construct a railroad from some point in the city of Troy, through the village of Waterford to the village

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of Ballston Spa, in the county of Saratoga, and as a necessary part of such railroad had constructed such bridge, leaving over the principal part of the channel an opening for a convenient and suitable draw, to enable vessels navigating the river to pass and repass. To this plea there was a demurrer, and after argument the court gave judgment for the defendants on the demurrer, sustaining the plea. Chief Justice SAVAGE, who delivered the opinion of the court, among other things says: "It is, however, a proposition not disputed, that but for the power granted by the constitution to congress, the state legislatures would have as full and entire control over the waters of the several states as they have over the land." "The only objection to the exercise of such a power might be that the injury to navigation might exceed the benefits to be derived to society, otherwise than from such an accommodation; and on that point the sovereign power must be the judge. It is for the legislature and the legislature alone to judge of the expediency of exercising any of its acknowledged powers in any given case" (p. 132). He proceeds to argue that the power to erect bridges over navigable waters has not been surrendered to the general government, and necessarily resides in the state legislatures. He further says (p. 133): "By a free navigation, must not be understood a navigation free from such partial obstacles and impediments as the best interests of society may render necessary." "There can be no question therefore that the state legislature has the power to build bridges where they shall be necessary for the convenience of its citizens." "A bridge with a draw which shall be opened free of expense for every vessel sailing under a license as a coasting vessel, affords all the accommodations necessary for citizens in the vicinity, or for travelers, and does not impede the navigation in any essential degree" (p. 134).

So long as the defendants keep within the limits of the law, there is not of course, if we waive the discussion of

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the constitutional question, any ground for the injunction. There is not sufficient evidence on this motion that they have transcended those limits. The defendants meet the particular allegations of the complaint as to the plan, size and dimensions of the proposed bridge by a flat denial. They meet the general allegations of the complaint that any bridge whatever, built in conformity with the other requirements of the act, would violate that requirement which forbids any substantial obstruction to navigation, by saying that the legislature by prescribing certain regulations as to the manner of building the bridge, have in effect declared that a compliance with those regulations will exempt the bridge so far from the imputation of making substantial impediments to navigation.

I think, therefore, the motion to dissolve the injunction must be granted. I should incline in any event to modify it, as covering more ground than was embraced in the original order, to show cause, which was as far I think as the injunction should in any view have extended, and as anticipating a state of circumstances which had not yet arisen. But as the whole equity of the complaint has been denied or successfully answered, I think the whole injunction must be vacated. The plaintiff may, however, hereafter obtain more satisfactory information or preponderating and more reliable evidence of the plan and mode of construction of the bridge which the defendants design to build, and therefore I think the dissolution of the injunction should be without prejudice to a renewal of the application, upon sufficient proof of those facts. Should such application be made, it will be more satisfactory to a legal tribunal to have the defendants meet it, if they are able, with some evidence by witnesses, of the plan and character of the structure which they propose to build, and of its not being justly obnoxious to the imputation of presenting substantial obstructions to navigation, instead of relying wholly upon the legislative intent to be gathered from the pro-

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visions of the act. The question in its true practical aspect must at some time be met, and it is better for the cause of justice and ultimate right, that both parties should present themselves upon the precise ground which they intend ultimately to occupy.

Ten dollars costs of making and opposing this motion, may abide the event of the action.

SUPREME COURT.

ALONZO BONESTEEL, JOHN N. SQUIRES AND GORDON N.
SQUIRES agt. WILLIAM V. FLACK AND OTIS GLYNN.

An ordinary *invoice or bill of sale*, which states in terms that the purchaser has bought of the vendors certain articles or goods at certain prices, and which accompanies the delivery of the goods to the purchaser, cannot be contradicted by *parol evidence* showing that the invoice was delivered in pursuance of a previous parol agreement between the parties that the goods were to be delivered to the purchaser as the agent of the vendors, and to be sold by him *on commission*; and that the title of the goods was to remain in the vendors, with a right to retake them at any time on non-payment of the sales as per agreement. The property held liable to seizure and sale on execution against the purchaser in possession. And it seems that the possession of the property in this case—liquors and wines to be sold at retail—being inconsistent with the continued ownership of the vendors, the transaction will be presumed fraudulent as against purchasers and creditors.

Fourth District General Term, May, 1864.

POTTER, BOCKES, JAMES and ROSEKRANS, *Justices.*

THIS action was brought by the plaintiffs as copartners, against the defendants for damages in wrongfully taking, seizing and carrying away, and converting to their own use a quantity of liquors—describing them—which the plaintiffs averred that they owned, and which were at the time of such seizure in the possession of one William Hubbard, of Oswegatchie, in the county of St. Lawrence, who was alleged to be an agent of the plaintiffs, and claimed damages for \$165.35. The defendants answered, that such

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liquors were seized and sold by defendant Glynn as a constable of the town of Oswegatchie, by virtue of an execution on a judgment rendered before a justice of the peace in favor of William V. Flack, one of the defendants in this action, against William Hubbard. They averred, upon information and belief, that said liquors were, at the time of such seizure and sale, the property of the said William Hubbard, and not the property of the plaintiffs. The cause was brought to trial at a circuit court, held at Canton, St. Lawrence county, in February, 1863, before Hon. A. B. JAMES, and a jury. The plaintiff's produced said William Hubbard as a witness, who testified that he resided at Heuvelton, and was a hotel keeper; he received from the plaintiffs a consignment of liquors (describing them) the liquors in suit, in January, 1862. Defendant Glynn took them from his cellar and carried them away. Witness received these liquors from the plaintiffs, and was to pay for them when sold; and they were to remain plaintiffs' property till sold by him, and they had the right to take them away at any time. He made the bargain with George N. Squires, one of the plaintiffs. Witness had no other liquors when they were taken away. On *cross-examination*, testified that he had these liquors to sell on commission; was to have all he could make over what they were billed to him at. He was to account to plaintiffs for what liquors he sold at certain prices per gallon; had sold several gallons out of each of the parcels by the glass; did not keep the money separate from other money received by him. The liquors came to him by railroad, with a letter from plaintiffs, saying they had shipped to him so much liquor per order of G. N. Squires; prices of liquor carried out on the letter; could not find the letter. It was a regular bill of so much liquor at so much per gallon, with no other qualification that he recollected. Witness told Glynn, the evening before the liquors were taken away, that they were not his; that they belonged to Mr. Squires. One of the

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plaintiffs testified that the plaintiffs were partners doing business under the firm-name of Bonesteel, Squires & Brother, at Troy, N. Y.—their business being the sale of foreign and domestic liquors and wines; was at the house of Wm. Hubbard in Heuvelton, in January, 1862; then made an arrangement with him about consigning to him these liquors for sale; had seen an invoice of the liquors made by their house at Mr. Hubbard's. The plaintiffs' counsel then asked the witness the following question: "What was the agreement between you and Hubbard as to the liquors?" The defendants' counsel objected to any other evidence being given by the plaintiffs as to the said bargain and agreement, unless the said invoice should be produced in evidence on the part of the plaintiffs; which objection was sustained by the court, and the plaintiffs excepted. Thereupon the plaintiffs produced in evidence the said invoice as follows:

TROY, N. Y., *January 22, 1862.*

MR. WILLIAM HUBBARD, *Heuvelton, N. Y.:*

Bought of Bonesteel, Squires & Brother.

(A. Bonesteel, J. N. Squires, G. N. Squires, No. 313 River street, Troy. Sole agents in this city for Longworth's Cincinnati wine.)

1 bbl. 8s. Holland gin, 44½.....	\$1 15	\$52 13
½ bbl. 10s. St. Croix rum, 21.....	1 20	26 45
½ cask Segt. brandy, pale, 23½, 2 E.....	3 25	74 75
1 keg 8s. old Tom gin, 11.....	1 35	15 85
1 keg 8s. Malaga wine, 12.....	1 00	12 00
Dry cask to pack brandy 3s., cartage 3s.,		75

\$181 93

The above shipped you this day to your address by C. R. R. via Rome to Hermon station, agreeable to your esteemed order to our Mr. Squires.

Yours truly, &c.,

January 23.

BONESTEEL, SQUIRES & BRO.

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Plaintiff further testified that his agreement with Hubbard was this: that they would send him a barrel of gin; one-eighth cask of brandy; a half barrel of rum, and (he thought) a small keg of old Tom gin, and a small cask of Malaga wine; that he should receive the goods and pay as he sold, and for what he sold; that plaintiff would visit his house every two or three months and ascertain the amount sold; and if he should fail so to pay, plaintiff should take them away. The liquors were to remain plaintiffs until paid for. Hubbard was to account to them for the gin he should sell at \$1.15 per gallon; for the brandy he should sell at \$3.25 per gallon; for the St. Croix rum he should sell at \$1.25 per gallon; for the wine at \$1 per gallon. When plaintiff came around, he was to ascertain what had been sold and receive pay for that; and unless he had paid up each time for the amount sold, plaintiff was to take the rest away. Plaintiff's business in the firm was that of travelling partner. These liquors had not been paid for by Hubbard at the time they were seized by Glynn. John N. Johnson, a witness on the part of the plaintiffs, testified that he knew Hubbard and Gordon N. Squires; was present and heard an agreement between Squires and Hubbard as to the consignment from Squires to Hubbard of a quantity of liquor. Squires said he would send him on a bill of liquor, and the liquor should remain his till Hubbard paid for them; that he would come round every two or three months, and Hubbard should pay him for what he had sold. Squires had the right to take away the liquors at any time; Squires said to Hubbard he would not sell to Hubbard any liquor. Hubbard was to pay for them as fast as he sold. Nothing was said about his having the privilege of buying all the liquors. The understanding was, Hubbard was to sell on commission for Squires in the hotel, and account for what was sold.

The defendants put in evidence and proved the judgment and execution upon which the liquors were seized and sold.

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and the quantity that was sold. The jury found a verdict for the plaintiff of \$74.43, subject to the opinion of the court. The cause having been reserved for further consideration on the motion for a non-suit, after having the value of the property assessed by the jury, the court directed that an order be entered non-suiting the plaintiffs. The plaintiffs thereupon appealed to the general term.

SAWYER and RUSSELL, for plaintiffs, appellants.

I. The agreement between the plaintiffs and Hubbard, under which the liquors were consigned to him, was not a sale, because 1st: To constitute a sale there must be an agreement on the part of the vendor to part with the title to his property, and on the part of the vendee to acquire the title. (*Defonclear agt. Shottenkirk*, 3 *John*. 170; *Parsons on Contracts*, vol. 1, 435.) There must be a consent to part with the title (*Saultus agt. Everett*, 20 *Wend*. 275). In this case, so far from any such consent existing, there was an express agreement that the plaintiffs should not part with their title, and that Hubbard should acquire none. The plaintiffs could not be divested of their property without their consent (*Covill agt. Hill*, 4 *Denio*, 327).

2. Under the bargain the plaintiffs were at liberty to resume possession of the liquors at any time, and they could have maintained replevin against Hubbard for the balance of the liquors unsold upon a demand made by them, and a refusal by him to deliver. (*Strong agt. Taylor*, 2 *Hill*, 326; *Herring agt. Willard*, 2 *Sanford*, 418; *Wescott agt. Thompson*, 18 *N. Y.* 363; *Barrett agt. Pritchard*, 2 *Pick*. 312; *Russell agt. Minor*, 22 *Wend*. 659, 664-5; *Keeler agt. Field*, 1 *Paige Ch.* 312.)

3. The fact that Hubbard was to draw out of the casks and retail in his bar portions of these liquors, could not affect plaintiffs' title to that portion not drawn from the casks; for if it could, every consignment of goods to a

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factor to sell upon commission, would pass title in the whole property to the factor so soon as he should sell any portion of the consignment. It would in fact be saying that every consignment of goods to an agent to retail upon commission, is a sale, and renders the goods liable for the agent's debts, and that there can be in law no such thing as a consignment for the purpose of retail. (*See Seymour agt. Wyckoff*, 10 *N. Y.* 216, 217.)

4. Hubbard in no event was to pay for any more of liquors than he should sell, and it was expressly provided that it should not be a sale, but a consignment; that title should remain in plaintiffs, and Hubbard should acquire none. It is not perceived, therefore, how the defendants could legally sell them as Hubbard's property. (*Strong agt. Taylor*, 2 *Hill*, 326; *Herring agt. Willard*, 2 *Sand.* 418; *Porter agt. Pettingill*, 12 *N. Hamp.* 296.)

5. The contract was a bailment, and not a sale. (*Morse agt. Stone*, 5 *Barb.* 516; *Pierce agt. Schenck*, 3 *Hill*, 28; *Rightmeyer agt. Raymond*, 12 *Wend.* 51.)

II. The invoice of the liquors sent to Hubbard, did not in any manner change or supercede the oral contract; but refers to and is confirmatory of that contract, and referring as it does to the oral contract, it was not necessary to express in it that the title to the property was to remain in the plaintiffs, for in the order given to Squires, referred to in the invoice, it had been expressly so agreed. It is sufficient if it appears that at the time of delivery, it was the understanding of the parties that the property was delivered upon the original agreement, and that it was so understood in this case, is shown by the testimony both of Squires and Hubbard. (*Whitwell agt. Vincent*, 4 *Pick.* 451-2; *Marston agt. Baldwin*, 17 *Mass.* 606.)

The words "bought of Bonesteel, Squires & Bro." in the invoice, were printed. The words "the above shipped you agreeable to your order to our Mr. Squires," were written. The written words control the printed. (*How-*

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(land agt. *Com. In. Co. Anthon's N. P.* and note a; 1 *Greenleaf on Ev.* § 278.)

The invoice by referring to the order given by Hubbard to Squires, would certainly authorize the giving of oral testimony of what that order was, and the agreement between Squires and Hubbard. And when proved, that agreement must govern and constitute the contract between the parties. (*Potter agt. Hopkins*, 25 *Wend.* 417, *Batterman agt. Pierce*, 3 *Hill*, 171-6; *Parsons on Contracts*, vol. 2, p. 65; *Agwam Bank agt. Strever*, 18 *N. Y.* 502-9.)

III. The title to the property having been expressly reserved by the plaintiffs, Hubbard had no interest in the property other than that of a factor, his commission being what he should sell the liquors at over a stipulated price, at which he was to account to his principals for whatever amount he should sell; such an agreement would give him no title to the property. (*Smith agt. James*, 7 *Cov.* 328; *Morss agt. Stone*, 5 *Barb.* 516.)

His possession was liable to be divested at any time by the plaintiffs resuming possession, as they had a right to do. Plaintiffs' title could be defeated only by a sale to a bona fide purchaser (*Edwards on Bailment*, 118, 119). It would not render it liable for his debts (*Edwards on Bailment*, 117). Especially so when it does not appear that the debt was contracted upon the credit of the property, and the officer was informed before levy of plaintiffs' title. (*Stevens agt. Wilson*, 3 *Denio*, 462-3-8-9; *Parsons on Contracts*, vol. 1, 80; *Covill agt. Hill*, 4 *Denio*, 323-8; *Same case on appeal*, 2 *Seld.* 375, 380; *Root agt. French*, 13 *Wend.* 270-4; 2 *Kent's Com.* 324-5.)

Hubbard not being the vendor, no question of fraud arises; his possession, which at best is only prima facie evidence of title, is shown to be subordinate to plaintiffs' title.

IV. If the title to the property was in plaintiffs, there can be no question as to the liability of both defendants;

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the taking of a note by Flack for the price for which the property sold, was a sufficient adoption and ratification of the act of Glynn to render him jointly liable for a conversion (*Cobb agt. Daws*, 10 N. Y. 335, 346): No question of this kind was raised on the trial, and cannot be here.

V. The evidence of Hubbard that the letter sent him by the plaintiffs was a bill of sale, in which he was debited with so much liquors, was clearly incompetent. This was not cured by the production of the bill, which was produced under the order of the court and exception of the plaintiffs. The judge erred in refusing to receive further proof of a bargain unless the invoice was produced, for the invoice was not the contract, but simply a bill of the prices at which Hubbard was to account to them for what he should sell.

VI. The value of the liquor having been assessed, if the nonsuit is set aside, final judgment should be rendered for the plaintiffs, pursuant to the stipulation contained in the case.

MYERS and MAGONE, for defendants, respondents.

I. The invoice or bill of sale is absolute upon its face, and a party to it cannot impeach or contradict it. (*Overseers of the Poor of New Berlin agt. the Overseers of the Poor of Norwich*, 10 John. 229; *Louber agt. LeRoy*, 2 Sand. 202; *Erwin agt. Saunders and Ely*, 1 Cow. 249.)

When the delivery of goods is to the party, parol evidence is not admissible to prove that it was conditional and not absolute. (*Worrall agt. Munn and Prall*, 1 Sel. 229.)

The written contract governs so far as the parties thereto are concerned; it is only third parties who can allege fraud. There is no ambiguity about the invoice that needs explanation. It is an ordinary bill of so much liquor at a stipulated price per gallon, and the aggregate stated.

II. Even were the only question in the case the true con-

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struction of the verbal agreement between the witnesses Squires and Hubbard, still the non-suit was properly granted.

The testimony of Hubbard shows a valid purchase, with a condition that he might at his election return the liquor or account for it at a specified price. He was to have the entire avails after paying the stipulated price set forth in the bill.

In *Hurd agt. West* (7 Cow. 752) the court decided that when a contract is to return particular property bailed, or deliver property of the same kind and quality, or when the contract to do the latter only, the letting in such case operates as a sale, and vests the title in the bailee. In *Carpenter agt. Griffin & Spencer* (9 Paige 310), the principle enunciated in *Hurd agt. West* is approved. In *Marsh agt. Wickham* (14 John. 167), which action was founded upon a receipt for a quantity of leather, the court says: "The point in this case is whether the leather in question was delivered to the defendants to sell for the plaintiffs upon commissions, or whether it was an absolute purchase, and this must be collected from the receipt which was given at the time when the leather was received. This receipt is somewhat obscurely drawn, but the several stipulations and provisions in it are much more reconcilable with the construction, that the leather was purchased, than that it was received by the defendants to sell on commission. The rate at which the defendants were to pay, or the deduction which was to be made from the price fixed to the leather, is inconsistent with the construction; that it was a mere delivery to sell on commissions. This could not be the rate of commissions, for the deduction was to be one shilling on each side of the upper leather, and two shillings on each pound of the sole leather. The privilege which the defendants had of returning what remained unsold of the leather, was a stipulation for the benefit of the defendants in their payment for the leather. If it was a delivery

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to sell on commissions, there would have been some provision as to compensation or rate of commissions. But there is none, for it appears clearly that the deduction mentioned in the receipt could not have been intended as such. By the receipt, the defendants also stipulated to pay for the leather at a certain rate; this is not consistent with the notion of its being a bailment. A certain deduction was to be made in the price, which must be understood to be the price of purchase. It must, therefore, be considered a sale, with the privilege to the defendants of returning what remained unsold. The reason of the particularity in the designation or description of the leather might have been occasioned by the privilege to return what remained unsold, so as to prevent imposition. The parol testimony was inadmissible. If there is any ambiguity, it is latent and not explainable. If it was a purchase, the destruction by fire was the loss of the defendants alone. The motion for a new trial must, therefore, be denied."

The language of the court in the case last cited is applicable to the case under consideration. The nature of the transaction, the right of Hubbard to use up the liquor in his bar and to pay for it at a fixed rate, the bill of sale forwarded to him accompanying the liquor, and every other circumstance connected with the transfer of the possession of the liquor, strengthens the conviction that the transaction was an absolute sale; and if not so intended at first, that subsequently the condition was waived.

The plaintiffs were merchants at Troy, and not hotel keepers in Heuvelton, St. Lawrence county. They could not, therefore, legally sell liquor either by measure in quantities less than five gallons at a time, or by the glass in a hotel at Heuvelton. Is it not more than probable that before forwarding the bill that the partners at Troy decided not to require the condition, on the ground that it would be illegal, and therefore waived any and all conditions as to retaining the title? It is a well-settled princi-

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ple of the law, that the presumption of law is always in favor of the legality of a transaction and of innocence. (*Booth* agt. *Swezey*, 4 *Seld.* 276; *Starr* agt. *Peck*, 1 *Hill*, 270; *Smith & Blood*, agt. *Joice*, 12 *Barb.* 21.)

It is equally well settled that when goods are sold upon a condition as to payment, a subsequent unconditional delivery raises a presumption of a waiver of the condition and the burden of showing non-waiver, is with the vendor. (*Smith* agt. *Lyons*, 5 *N. Y.* 41; *Caldwell* agt. *Bartlett*, 3 *Duer* 341.) No such non-waiver was shown in this case.

III. It is an absurdity to argue that Hubbard was the agent of the plaintiffs, and selling their brandy worth \$3.25 per gallon at five cents per gill, as a gallon of the brandy (thirty-two gills) at this rate would bring only \$1.60, or a trifle less than half the value as stated in the bill; or, if we take the whole number of gallons included in the bill—112 gallons X 32 gills—3,584 at five cents per glass would only bring \$179.20, or \$2.73 less than the contract price, without estimating the cost of transportation.

It is to be hoped that no court will ever hold that such a contract can be made as that sought to be established in this case. To hold that a man can transfer the possession of his property for the very purpose of consumption, and yet hold the title himself, would, to our minds, lead to endless as well as profitless litigation, as well as to great uncertainty in transacting ordinary business.

It may well be questioned whether the American relaxation of the English common law principle, that possession of chattel property pursuant to contract of purchase carries legal title, has been attended with beneficial results.

In the case under consideration, it would be fair to apply the principle of estoppel against the plaintiffs, as it is well settled that when A puts his property into the possession of B by sale, or for the purpose or with the intent of enabling B to sell the property in violation of our laws, A cannot recover the purchase money. In this case the liquor,

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if the construction of the plaintiffs is to prevail, was placed in the hands of Hubbard to be sold in open and direct violation of the Excise laws of 1857, chap. 628, sections 6 and 13.

To hold that while the plaintiffs cannot recover against Hubbard, yet, nevertheless, that they can maintain this action against an officer who seized the property on an execution against Hubbard, cannot be supported on principle.

By the court, **BOCKES, J.** The plaintiffs claimed to recover the value of a quantity of liquors seized and sold by the defendant Glynn on execution in favor of the defendant Flack against one Wm. Hubbard. No question is made in regard to the judgment or execution, nor is it pretended that the defendants were not jointly liable in the action, if the liquors belonged to the plaintiffs. It was insisted on the trial, on the part of the defendants, that the proof showed the title to the property to be in Hubbard, the judgment debtor. The judge, on considering the whole case, non-suited the plaintiff and dismissed the complaint.

The plaintiffs were liquor-dealers in Troy, and delivered the property in controversy to Hubbard, a tavern-keeper in St. Lawrence county, who, at the time of its seizure, was retailing it at his bar. The plaintiffs insisted that the liquors were consigned to Hubbard on commission, not on sale, and that the title was to remain in them until disposed of by Hubbard. Evidence was given tending to substantiate this position. It appeared that the liquors were delivered under a written bill of sale, without qualifying terms. Hubbard swore that "it was a regular bill of so much liquor at so much per gallon, with no other qualification that he remembered." The plaintiffs, on defendant's call, produced their invoice—doubtless a counterpart or copy of the bill sent to Hubbard, which, omitting dates and immaterial advertising matters, was as follows :

Bonesteel agt. Flask.

"MR. WILLIAM HUBBARD :

"Bought of Bonesteel, Squires & Brother."

Then followed the list of six items, with number of gallons and prices carried out—in the aggregate amounting to \$181.93. Thereunder was written as follows :

"The above shipped you this day to your address, by C. R. R. via Rome to Hermon station, agreeable to your esteemed order to our Mr. Squires.

"Yours truly, &c.,

"BONESTEEL, SQUIRES & BRO."

By granting a non-suit, the learned judge held either that the evidence established a contract of sale in writing which could not be contradicted or varied by parol proof, or that the property was liable to seizure under execution against Hubbard, even if the sale and delivery were qualified and subject to the condition claimed by the plaintiffs.

The first question, then, is whether it appears from the written bill that the title passed from the plaintiffs to Hubbard. Does the written bill establish a contract of sale? If so, then it is conclusive; for it needs no citation of authorities in support of the proposition, that parol evidence is inadmissible to contradict or vary a written instrument. The bill of sale is unambiguous; and even if it fails to state the whole contract or transaction, it clearly declares a sale. It reads: "Bought of Bonesteel, Squires & Brother," naming the articles, and stating the price of each. Its plain signification—especially when read in connection with the fact that the property was delivered under it—is that the plaintiffs had sold to Hubbard the articles named at the prices given. This the bill of sale distinctly asserts, and this the plaintiffs proposed to contradict by parol proof, for they sought to show that there was no sale to Hubbard—only a bailment—a mere delivery to him for sale as their factor and agent. The general remark that a receipt may be explained and contradicted by parol is subject to qualification. In *Eggle-*

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ston agt. *Knickerbocker* (6 Barb. 458), it was held that a receipt could be explained by parol proof, when the explanation was not contradictory of it; and it was there further decided that a receipt absolute in its terms could not be shown by parol evidence to be upon condition; except on a proceeding to reform the instrument for fraud or mistake. This case was referred to, and the decision approved in *Coon agt. Knapp* (8 N. Y. 402), and the rule was reiterated. It had been before well established that in so far as a receipt partook of the nature of a contract, it fell within the rule excluding parol proof to contradict or explain it. In *Filkins agt. Whyland* (24 Barb. 379), it was decided that a bill of sale, in form like this but executed by the vendor, specifying the price and acknowledging its receipt, was to be construed as being a receipt for the purchase money, and that parol evidence of an oral warranty was therefore admissible. This decision was affirmed in the court of appeals (24 N. Y. 338.) In the case cited, it was not proposed to contradict the instrument. The proof of a warranty was entirely consistent and in consonance with it.

The case of *Filkins agt. Whyland* differs, too, from this under consideration in this; there the paper was given to evidence the receipt of the purchase money—not so here. In this case it was not made and delivered as a receipt, but to show and evidence the terms of sale; that is, to show the different kinds of liquor, the number of gallons of each, and the prices, and on its face declared a sale by the plaintiffs to Hubbard. The property was delivered and accepted under it. It was competent to prove by parol the delivery and acceptance under it, for such evidence, in no degree, conflicted with the terms of the written instrument. Where a contract rests partly in writing and partly in parol, oral proof is admissible to supply the deficiency in the writing (25 Wend. 417; 3 Hill 171-6; 2 Hilton 184.) But in these cases the oral proof is not in contradiction, and wholly destructive of the plain import and effect of the paper.

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Three things only are necessary to constitute a sale; a thing to be sold, a stipulated price, and the consent (duly given) of the parties. It has been well stated that any words importing a bargain, whereby the owner of a chattel signified his willingness and consent to sell, and whereby another person shall signify his willingness and consent to buy, *in presenti*, for a specified price, would be a sale and transfer of the right to the chattel. Here the owners signified in writing their consent to sell the property, naming the articles and prices, and the vendee accepted them at the prices given pursuant to the bill. The writing was not delivered as a receipt, as was the case in *Filkins agt. Whyland*, but was given to evidence the transaction in pursuance of which the property was delivered, and with the change of the possession of the property, became the evidence of the transfer of the title. This distinction is marked and commented on by Judge SELDEN, in *Terry agt. Wheeler* (25 *N. Y.* on page 523). He says in substance, that when such a paper is delivered as a memorandum of a sale (not as a receipt of payment of the purchase price), it will be the evidence of a contract not open to contradiction or explanation by parol.

In the case at bar, the parol evidence flatly contradicted the writing, which, under any aspect of the case, was part and portion of the contract under which the property was delivered. The paper asserts a sale to Hubbard, without condition or qualification. It purports to transfer to and vest the title in him. In this respect it differs widely from *Herring agt. Hoppick*, (15 *N. Y.* 409), in which case the instrument declared that the title did not pass until performance of the conditions by the vendee. Here the parol proof is to the effect that there was no purchase by or sale to him; that the property was delivered to Hubbard as an agent of the plaintiffs. In this way they sought to establish a special bargain, quite inconsistent with the plain import of the paper. In my judgment the learned judge

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was right in holding to the paper as the evidence of the transaction under which the plaintiffs parted with the property to Hubbard.

The plaintiffs' counsel is quite correct in saying that they cannot be divested of their property without their consent. This proposition is asserted in a great number of cases, nor does it need the sanction of authority for a principle so plain and just. But it is made to appear, as we have seen, that they gave their consent to the transfer, as is evidenced by the written bill of sale under which the property was delivered, and which cannot be countervailed by oral proof. The case stands the same as if the parol proof that the liquors were consigned to Hubbard to be sold for the plaintiffs, and as their property, in Hubbard's tavern by retail, was stricken out. This cannot be allowed to contradict the written evidence of the transfer of the title to Hubbard.

I do not discover that the incompetent evidence was excluded or expunged by any order entered in the proceedings at the trial; while I think this would have been the better mode of trial, still it was probably unnecessary. It was the duty of the court to disregard the parol agreement if inconsistent with, and contradictory of the writing. This was held in *Durgin agt. Noland* (14 N. Y. 322), Judge DENIO says, that in such cases if the parol agreement be proved, it is still the duty of the court and jury to give effect to the writing in opposition to the verbal contract, on the ground that whatever the parties may have said, they had fixed upon the writing as the exponent of their views. He adds, "so, although the judge erred in admitting the parol evidence, it is not necessary for him to commit the further error of giving to it a controlling effect over the writing, which still remained the only authentic evidence of the bargain." On the whole, I am satisfied that the learned judge was right in holding that the evi-

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dence showed a transfer of the title to the property, rather than a bailment.

There is another view of the case decisively against the plaintiffs' right of action. Concede that the liquors were delivered by the plaintiffs, liquor merchants in Troy, to Hubbard, a tavern keeper in St. Lawrence county, to be by him retailed at his bar, and that the title was to remain in the plaintiffs until sold. Were not the liquors liable to seizure and sale under execution against Hubbard? The case of *Ludden agt. Hazen* (31 *Barbour*, 650), seems conclusive of this question. In the case cited, the gin was delivered under a written receipt, stating that it was to remain the property of the plaintiff until paid for, and to be paid for when sold, or returned when called for. In the case at bar, according to the plaintiffs' claim, the liquors were to remain the plaintiffs' property until sold, to be paid for when sold, and the plaintiffs had the right to take them away at any time. It will be seen that the contracts are precisely alike. In *Ludden agt. Hazen*, it was held that where the purpose for which the possession of the property is delivered to the buyer is inconsistent with the continued ownership of the claimant, the transaction will be presumed fraudulent as against purchasers and creditors. In this case it was said, that in such case the form of the transaction will be deemed to be colorable, and the title held to have vested absolutely in the buyer. That inasmuch as the party was to deal with the goods as his own, the title as against creditors and purchasers rested absolutely in him. Admitting, therefore, that the arrangement was such as the plaintiffs claim it to have been, and the property was liable to be levied on and sold under execution against Hubbard.

The nonsuit was properly ordered, and the judgment entered thereon must be affirmed.

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SUPREME COURT.

GEORGE H. LAWRENCE agt. FREDERICK SMITH and others.

A claim for damages for the breach of a *parol contract*—to sell *standing trees*, cannot be sustained. The contract not being in writing is *void*.

Where such contracts are enforced specifically in equity, it is in part owing to the circumstance that no recovery in damages for the breach of them can be had. Courts of equity do not remunerate parties by damages arising out of the breach of agreements which are void under the statute of frauds.

Therefore, the promise of the plaintiff who is alleged to have violated such a contract, to pay a certain sum as damages for such alleged violation, is without consideration, and cannot be enforced by the defendants as a recoupment; although the action is brought upon the defendants' promissory note, given for part of the purchase price of the property sold under the contract.

Erie Special Term, July, 1864.

MOTION for a new trial on a case with exceptions. This action is brought to recover the balance remaining unpaid on a promissory note made by defendants, and payable to the plaintiff, for eight hundred dollars, in sixty days from its date, which is February 6, 1862. The defendants in their answer seek to recoupe certain damages growing out of the following state of facts, as they appeared upon the trial at the Erie circuit in March, 1864.

At the time of giving the note the plaintiff was the owner of 146 oak timber trees, all but four or five of which were standing on his farm in Erie county, all of which trees the plaintiff sold to the defendant Smith, for \$1,000, which was to be paid by him by giving \$200 in cash and the note in question, signed by Smith, and indorsed by defendant Pfanner. Upon the payment of this money and the delivery of the note thus signed and indorsed, the trees were to belong to Smith, who was to have permission to enter upon the plaintiff's close and cut and remove the same.

The money was paid and the note delivered according to the terms of the purchase and sale, and was so accepted by the plaintiff, who had selected the indorser himself. The

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defendant Smith, who was a lumberman, thereupon employed a number of men and teams to cut and draw these trees to market, and commenced cutting and drawing them away.

The defendants then offered to show that in the absence of the defendant Smith, and after he had by his men and teams commenced cutting and removing said trees and making the road, the plaintiff became dissatisfied with the indorser on the note, and stopped the defendants' men and teams, and refused to let the defendants cut and remove any more of said trees. That on the return of defendant Smith, the plaintiff informed him that he desired further security, and offered to take defendant Sturmer, as he had learned that Pfanner was not good, and that at defendant Smith's request, Sturmer signed said note; that plaintiff then permitted defendant to cut and remove the remainder of said trees, which he did; that in consequence of the plaintiff's stopping defendants' men and teams, they remained idle for two and a half days, for which time defendant Smith had to and did pay them—subjecting him to great damages.

To which offer the plaintiff's counsel objected, and the court excluded the testimony on the ground that the contract not being in writing was void, and the defendants could not recover damages for a breach of it. To which ruling and decision the defendants duly excepted.

The defendants then offered to prove that on account of the said stopping of the defendant Smith, in cutting down said trees, the plaintiff afterwards agreed to allow him the sum of one hundred dollars as damages, to be deducted from said note, and the evidence was received under such offer.

Defendant Smith, who was a witness, testified: At the time Sturmer signed the note, plaintiff said he would make it right with me at the end of the note for the damages I sustained by his stopping my men and teams; I had another conversation with him after that and last spring;

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he then said he had agreed with me to throw off \$100 on account of stopping of the work.

On being cross-examined he testified : The conversation to make it right with me about the damages, was after Sturmer had signed the note ; it was at my mill that the plaintiff said he would allow me \$100 ; He said he would allow me the \$100 at the end of the note, if I paid up the balance.

Robert Cook sworn for defendants, testified : I was present at an interview between defendant Smith and plaintiff about the note ; Smith requested me to figure up balance due on note ; I commenced figuring, when plaintiff said he would not take any interest, and that he would allow Smith \$100 on the note as they had agreed on ; Lawrence said he threw off \$100.

The plaintiff was then sworn as a witness in his own behalf, and testified : I told him (Smith) if you will pay me up honestly and honorably, I will throw off the interest from the note ; I did not promise to throw off \$100.

The evidence was here closed, and the defendants' counsel claimed that the case should go to the jury ; and he desired to be heard upon the question of damages, and also as to the plaintiff's agreement to pay the damages occasioned by his stopping defendants' men and teams from cutting and removing said trees. But the court refused to allow the case to go to the jury at all.

To which decision the defendants duly excepted.

The court then charged the jury that the defendants could not set off the damages they had sustained by reason of the plaintiff's having stopped them from cutting said trees against the plaintiff's demand in this action, for the reason that the agreement was void, being an agreement to sell an interest in real estate, and not having been reduced to writing, and subscribed by the party to be bound thereby ; that the defendants had failed to make out a defence to the

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action, or to any part thereof; and that the plaintiff was entitled to their verdict for \$207.42.

To which charge, and each and every part thereof, defendants' counsel duly excepted. The jury accordingly rendered a verdict for the plaintiff.

The defendants thereupon moved for a new trial..

L. L. LEWIS, *for plaintiff.*

GEO. W. COTHEAN, *for defendants.*

I. Timber trees unsevered from the earth are a part of the realty (*Green agt. Armstrong*, 1 *Denio* 550).

II. A verbal contract, unexecuted for the conveyance of an interest in real property, is void. (3 *R. S.* 220, §6, 5 *Ed.*) So a parol license to enter upon lands is void, and may be revoked at any time.

III. But when the verbal contract or parol license has been executed, it is not absolutely void. (*Pierrepoint agt. Barnard*, 2 *Seld.* 279; *Whitehouse agt. Moore*, 13 *Abbott's Pr. R.* 142.)

1. By complying with the terms of the purchase and taking possession of the property, Smith acquired such rights as that a court of equity would have compelled Lawrence to convey the trees to him by a proper legal title. (*Malins agt. Brown*, 4 *N. Y. R.* 403; 3 *R. S.* 221, § 10; *Traphagan agt. Traphagan*, 40 *Barb.* 537.)

2. It is true, that Smith could have recovered back the consideration paid by him on the plaintiff's refusal to perform the contract, on the assumption that the contract was void; but by performing the contract on his part, he acquired the equitable title to the trees, and consequently had his election either to recover back what he had paid, or to compel a specific performance of the contract. (*Utter agt. Stuart*, 30 *Barb.* 20.)

3. The true tests to determine whether the court will decree specific performance are, would the refusal to com-

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pel performance operate as a fraud upon the defendant? And would a restoration of the money paid be a full indemnification?

4. The recovery by the defendant of the money paid by him would not indemnify him. He had sustained damages in consequence of the plaintiff's wrongful acts, which he seeks in this action to have allowed.

5. It was most clearly a fraud upon the defendant, for the plaintiff to retain the trees and the purchase price paid at the same time.

6. It is therefore submitted, that the defendant Smith holding the equitable title to the trees, and the plaintiff the considerations therefor, the plaintiff could not, with impunity, occasion damage to the defendant, and escape liability on the pretext that, not having executed a written conveyance, he was not liable. Every wrong has its appropriate remedy; every fraudulent act is punishable by the law.

7. It is safe to go further and say, even though this contract were void, as the plaintiff claims, yet, while he holds the price of the trees, he must be held liable for all damages resulting to the defendants by reason of his own *wrongful or fraudulent acts*, until he has notified the defendant of his refusal to perform the contract. It certainly was *fraudulent* in the plaintiff to enter into this contract, receive the defendant's money and securities, and then, in his absence, to occasion him damages without a return of the considerations or a notification of his refusal to perform. It, therefore, presents the singular aspect of one man wilfully deceiving another and occasioning him damages by his fraudulent conduct; and yet the court says the defendant is remediless—that the plaintiff may violate his contract, refuse to deliver the trees, retain the defendant's money, occasion the defendant damages by his fraudulent conduct, without incurring any other liability than to be compelled to refund the money received by him. All this may be law, but it is not equity.

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8. Suppose the trees had not belonged to the plaintiff, but to another man, and the plaintiff had assumed to sell them, and precisely the same transactions had taken place, with reference to them, between the plaintiff and defendant, would it for a moment be contended that the plaintiff would not be liable to respond to the defendant in damages for the injury his wrongful acts had occasioned?

In so far as the plaintiff's liability to respond in damages is concerned, it is not very material whether the contract was of sufficient validity to convey the title to the trees or not. If it conveyed the title to the trees, his liability is unquestionable; if it did not convey the title to them, then he is liable for the reasons assigned under our seventh proposition.

IV. A mere parol license may be revoked without incurring liability to pay damages. But a parol license, based upon a valuable consideration, is irrevocable. (*Wood agt. Manley*, 11 *Adolph. & El.* 34; *Winter agt. Brockwell*, 8 *East*, 308; *Taylor agt. Waters*, 7 *Taunton R.* 384; *Liggins agt. Inge*, 7 *Bing.* 682; *Wood agt. Lake*, *Sayer R.* 3.) The license to enter being irrevocable, by interfering with the defendant's enjoyment thereof, the plaintiff incurred liability to respond in damages.

V. After the breach of the contract by the plaintiff, and after the defendant had been damnified by the plaintiff's wrongful acts, the plaintiff, upon being furnished with additional security, and which the defendant was under no obligation to furnish, treated the original contract as valid, permitted the defendants to cut and remove the trees, and accepted and received nearly the whole purchase price of the trees, and then brings this action upon the note given on the original purchase, and in affirmance of the original contract. Both parties have substantially performed the contract—both parties have treated it as valid *ab initio*, and, received almost its entire fruits. According to the broad principles laid down in *Pierrepont agt. Barnard*

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(*supra*), this contract is no longer void by the statute of frauds, but is an executed contract and valid.

The giving of a new surety was not the creation of a new contract, but a mere continuance of the old one—the same terms of sale and purchase, the same note remaining. It is a mutual agreement that the old contract was binding on both parties; that they will abide by its terms and submit to all the liabilities incident thereto—regarding it as valid, legally.

It is altogether too late for the plaintiff to object that he is not liable to respond in damages for the injury he has caused the defendant. If he had desired to avail himself of that plea, he should have totally abandoned the old contract and made a new one. But having treated it as valid, and received its fruits, he must expect to be held liable to pay the damages growing out of his own breach, for no man shall take advantage of his own wrong.

But it was claimed by the plaintiff at the trial, that by this new arrangement the defendant waived his claim for damages. The converse has been held in the court of appeals. It is there said, "where a right of action has accrued for the breach of an agreement, such right can only be destroyed by a release under seal, or by the acceptance of something in satisfaction of the injury." (*McKnight agt. Dunlap*, 1 *Selden R.* 537.)

VI. The court erred in its refusal to allow the case to go to the jury, and in directing a verdict for the plaintiff for the full amount unpaid on the note.

The defendant Smith and the witness Cook testify to a promise on the part of plaintiff to allow the defendant \$100 on the note on account of the damages he had occasioned the defendant. This promise is denied by the plaintiff, which created an issue for the jury to pass upon. But the court held the promise, even if made, was without consideration and void.

According to the principles enunciated in *The Commercial*

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Bank agt. Warren (15 *N. Y. R.* 584), no consideration was necessary. In that case it is held that a promise to pay a debt contracted by a third party, and as to which the defendant was in no wise liable, requires no new consideration to support it. If it requires no new consideration to support a promise to pay a debt contracted by a third party in the name of a firm of which the defendant was a member, but without his knowledge or consent, and for the individual benefit of the party contracting the debt, by a parity of reasoning it should require no new consideration to support the promise of the plaintiff to remunerate a party for damages occasioned by the promisor's own wrongful act, even where the occasioning of the damages created no liability to respond thereto.

But we contend that the defendant having sustained damages in consequence of the wrongful act of the plaintiff, he is entitled to adequate compensation. The injury to him, and the additional surety to the plaintiff, furnish sufficient consideration to support the promise, if any consideration were necessary.

DANIELS, J. The contract, for the breach of which the defendant claimed to be entitled to damages, was for the sale of standing trees, and not being in writing was void. The plaintiff incurred no obligation in law by which the defendant Smith could insist upon the agreement against his refusal to observe it. (*Green agt. Armstrong*, 1 *Denio* 551.) Even if it be conceded that the defendant could have enforced a specific performance of the agreement in equity, that will in no way aid the claim he now makes for damages; for courts of equity do not remunerate parties by damages arising out of the breach of agreements which are void under the statute of frauds. When these contracts are enforced specifically in equity, it is, in part, owing to the circumstance that no recovery in damages for the breach of them can be had. There was, then, no legal

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or equitable obligation resting on the plaintiff to pay the damages caused by his interruption of the work of cutting and removing the trees. The most that can be said is, that he was under a moral obligation to do so.

The promise predicated on that, after the additional indorser was given on the note, to allow the defendant one hundred dollars by way of damages for such interruption, was without consideration. It did not, therefore, entitle the defendant to a recovery of that sum upon the trial of this action. To render the promise binding, the obligation forming its consideration should have been one that at some time could have been enforced in law or equity against the plaintiff. (1 *Parsons on Contracts* 358-361; *Smith* agt. *Ware*, 13 *Johns. R.* 258; *Ehle* agt. *Judson*, 24 *Wend.* 99; *Cameron* agt. *Fowler*, 5 *Hill* 308.)

The motion for a new trial is denied with costs.

SUPREME COURT.

JOHN STEVENSON agt. BENJAMIN F. McNITT, sheriff, &c.

It seems that a motion to dismiss an appeal on the ground that the appeal was brought after the time allowed by law for bringing appeals had expired, may be waived by laches in moving.

Fourth Judicial District, General Term, July, 1864.

Present, POTTER, JAMES, BOCKES and ROSEKRANS, Justices.

THE plaintiff had a verdict, and defendant moved at special term to set aside the verdict of the jury and for a new trial, on the ground of improper interference with the jury. The motion was denied, and an order to that effect filed and served on defendant's attorney on the 5th day of September, 1863, by mail. On the 7th day of November, 1863, defendant's attorney served a notice of appeal from said order to the general term (having by inadvertence allowed

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the time prescribed by law to appeal, to pass by). There was a general term in said fourth district in January, 1863, and also in May, 1863. On the 12th day of April, 1863, defendant's attorney noticed said appeal for argument at said May general term, but the argument was postponed by stipulation (oral) of the respective attorneys.

On the 8th day of June, 1863, defendant's attorney again noticed said appeal for argument at the July general term, and on the same day the plaintiff's attorney served notice of motion to be heard at said July term, to dismiss said appeal, on the ground that it was not brought within the time allowed by law for bringing an appeal (defendant had allowed said two general terms to pass by and done nothing in the matter).

N. B. MILLIMAN, *for motion.*

E. HILL, *opposed.*

Held, that the plaintiff had by delay waived the right to make the motion to dismiss the appeal from said order, and the appeal was allowed to stand.

There was no written opinion.

SUPREME COURT.

DAVID R. LEE, respondent agt. GEORGE WILKES, appellant.

Previous to the Code, the non-joinder of a copromisor could be taken advantage of only by plea in *abatement*.

Since the Code, a defect of parties can only be taken advantage of by *demurrer*, when apparent on the complaint, or when not, by *answer*.

Although the proof may show a joint liability of the defendant with another, and thus may constitute a variance, yet if the objection is not taken in the mode pointed out by the Code, it is one which the defendants shall be deemed to have *waived*.

New York General Term, May, 1864.

Before LEONARD, P. J., CLERKE and SUTHERLAND, *Justices.*

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THIS was an appeal from a judgment rendered on a verdict of a jury. Cause was tried before Hon. Justice LEONARD.

The action was brought by the respondent against the appellant, to recover from the appellant as editor, proprietor and publisher of a newspaper in the city of New York, variously called "Porter's Spirit of the Times," and "Wilkes' Spirit of the Times," for the services of the respondent as an assistant editor, and as one of the critics and reporters for said paper. It is averred in the complaint that the appellant at the time therein mentioned, was the editor, proprietor and publisher of said paper; that during the year 1857, the defendant being such proprietor, publisher and editor, employed the plaintiff as assistant editor, &c. The answer is a general denial.

Upon the trial, the plaintiff on the cross-examination by defendant's counsel, was asked the following questions: . .

"Did you not know that Mr. Tomlinson was a partner in the partnership of that paper with the defendant, under the firm name of Wilkes & Co.?" which question was objected to by the counsel for the plaintiff and excluded, and an exception taken by defendant.

A similar objection was made by the plaintiff's counsel to the following question put to the witness on the cross-examination by defendant's counsel, viz.:

"Were there not other proprietors interested with the defendant in 'Porter's Spirit of the Times' during the time you contributed to its columns?" which question was excluded, and the defendant's counsel duly excepted.

James McGowan, a witness for the plaintiff, being cross-examined by defendant, was asked the following question, namely:

"Who were the proprietors of 'Porter's Spirit of the Times' during the time that the plaintiff contributed to its columns?" which question was excluded, and an exception taken by defendant.

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The defendant testified that "at the time of the arrangement made with the plaintiff, I made the same on behalf of the proprietors and owners of 'Porter's Spirit of the Times,' who were James B. Devoe and myself."

The case being closed, the defendant's counsel requested the judge to charge the jury as follows: That if from the evidence they believe that during the time of the plaintiff's connection with "Porter's Spirit of the Times," that other parties were interested with the defendant as owners or proprietors of that paper, that there is a variance between the allegation in the complaint and the proof, and the plaintiff is not entitled to recover against the defendant for services rendered by the plaintiff in contributing to "Porters' Spirit of the Times." Which request was refused by the justice, and the defendant's counsel excepted. The jury found a verdict for the plaintiff in the sum of one hundred and twenty-two dollars and seventy-five cents.

JNO. K. HACKETT, *for appellant.*

I. The complaint avers that the defendant was the proprietor of the paper called "Porter's Spirit of the Times." Such an averment was necessary to the plaintiff's alleged cause of action, and the answer being a general denial, put in issue the allegation of proprietorship in the defendant, and the question of proprietorship became one of the issues to be tried by the jury. The plaintiff testified that he had made an arrangement with the defendant to write for that paper, and the defendant had a right upon his cross-examination to put that question and the other questions which were excluded.

II. The justice erred in refusing to charge the jury as requested by defendant's counsel; for

1. The question of proprietorship in the paper was distinctly raised by the pleadings.

2. To sustain his action under his complaint, the plain-

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tiff must have proved, to the satisfaction of the jury, that the defendant was the proprietor of the paper.

3. The plaintiff had given evidence as to the proprietorship of the paper in his direct examination, and his witness, McGowan, had also testified upon the same matter.

4. The defendant swears positively that "at the time of the arrangement made with the plaintiff, I made the same on behalf of the proprietors and owners of 'Porter's Spirit of the Times,' who were James B. Devoe 'and myself.' " This testimony is nowhere contradicted.

5. The defendant, under the pleadings and proofs, was entitled to have the issue of proprietorship submitted to the jury as asked by defendant's counsel.

DENNIS McMAHON, *for respondent.*

First.—The court properly excluded the exceptions taken in the case.

1. The evidence was only material in one point of view, viz., that the proper parties were not made defendants; or, in other words, to establish that there was a non-joinder of one or more of the co-owners or proprietors of the newspaper in question.

This defence, under the pleadings, could not be introduced, inasmuch as the defendant did not aver the defence in his answer.

2. Under the law before the Code, the non-joinder of a co-promisor or co-defendant could not be taken advantage of except by a plea in abatement, and was not a ground of non-suit. (4 *M. & S.* 475; *Petersdorff's abr. tit. non-joinder*, p. 753.)

3. Under the Code, the defect of parties, plaintiff, or defendant, is placed on the same footing, and can only be taken advantage of by demurrer, when apparent on the face of the complaint (*Sec.* 144), or by answer (*Sec.* 147.) If it is not so taken, then it is waived. (*Sec.* 148; *Zabris-*

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kie agt. *Smith*, 3 *Kern*. 236 ; *Mayhew* agt. *Robinson*, 10 *How*. 162 ; *Ingraham* agt. *Baldwin*, 12 *Barb.* p. 9 ; *Baggott* agt. *Bolyers*, 2 *Duer*, 160 ; *Fosgate* agt. *Herkimer, M. & H. Co.* 12 *N. Y. Reps.* 580 ; *Lewis* agt. *Graham*, 4 *Abb. Pr.* 106 ; *General Mutual Insurance Co.* agt. *Benson*, 6 *Duer* 168.)

4. It is alleged, however, on that ground, to be a fatal variance between the case as alleged and as proven (see request to charge.) To which we reply: 1. That under the old system of pleading, wherein the doctrine of variance was held strictly, a case which showed that another defendant should have been joined was not considered as a variance in the absence of a plea in abatement. 2. Under the Code, if the point taken be good on the point of variance, of what effect is section 148, which provides that the defence waives it by not taking the point of non-joinder by demurrer or answer? Can the defence have an indirect benefit of such a point, when they could not have directly under section 148? This point is decided in favor of our position in *Carter* agt. *Hope*, (10 *Barb.* 180.) 3. But if considered a variance, in order to be fatal, it must have been one which misled the defendant, otherwise, under section 169, it may be disregarded, or it may be amended at once, or treated as so done. The defendant must prove it to the satisfaction of the court he was misled. (*Zabriskie* agt. *Smith*, 3 *Kernan* ; *Keese* agt. *Fullerton*, 1 *Code Rep.* 52 ; *DePeyster* agt. *Wheeler*, 1 *Sand.* 719 ; *Catlin* agt. *Gunter*, 1 *Kern.* 368, 374, *opinion.*)

How could such a variance mislead a defendant, when the facts lay particularly within his own knowledge? It was the defendant's duty to have made a better writ for the plaintiff, by setting up the defence properly.

Second.—For the reasons stated in the last point, the court were right in refusing to charge, as requested by the defence, on the point of variance; and for the further reason that the defendant did not avail himself of his objection on that ground in a proper manner under sections 169 and 170 of

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the Code (*see those sections expounded in Catlin agt. Gunter*, 7 Kern. 374.) The defendant put his request to charge for variance, on the ground that the proof showed that other parties were interested with the defendant as owners of the papers, and on no other ground; thus showing that the variance complained of was a non-joinder, cured by section 148 of the Code.

Third.—The questions and evidence excluded by the court on the plaintiff's objections, were subsequently proven by the defendant himself on his examination, consequently thereby, the objections and exceptions were waived. (*Westlake agt. St. Lawrence Co.* 14 Barb. 206; *Schenectady and Saratoga Plankroad Co. agt. Thatcher*, 11 N. Y. 102 [1 Kern.]; *Lansing agt. Van Alstyne*, 2 Wend. 561; *Barrick agt. Austin*, 21 Barb. 241; 1 E. D. Smith, 542; 6 Duer, 382, 412; *Burton agt. City of Syracuse*, 37 Barb. 292; *Forrest agt. Forrest*, 1 Duer, 102; 7 Abbott's Pr. R. 215.)

By the court, CLERKE, Justice. Previous to the adoption of the Code of Procedure, the non-joinder of a co-principal could be taken advantage of only by a plea in abatement. Such pleas being abolished by the Code, the 144th section provides that when any of the defences enumerated in that section, among which is a defect of parties, the defendant may demur when this defect shall appear upon the face of the complaint. Section 147 provides when any of these defects do not appear upon the face of the complaint, the objection may be taken by answer, and section 148 provides when no such objection shall be taken, either by demurrer or by answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. It is no answer to this to say that the proof shows a joint liability of the defendant; this may be a

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variance, but it constitutes the very objection which the defendant shall be deemed to have waived.

Judgment should be affirmed with costs.

NEW YORK SUPERIOR COURT.

NATHAN DAVIDSON agt. THE MAYOR, &c., OF THE CITY OF NEW YORK.

The act of the legislature of 1855, commonly called the *riot act*, provides that "Whenever any building or other real or personal property shall be destroyed or injured, in consequence of any mob or riot, the city or county in which such property was situated shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for the damages sustained by reason thereof." And then provides that actions may be brought and conducted in the same manner that other actions may be prosecuted by law, and directs that "Whenever any final judgment shall be recovered against any such city or county, in any such action, the treasurer of such city or county shall, upon the production and filing in his office a certified copy of the judgment roll, pay the amount of such judgment to the party or parties entitled thereto, and charge the amount thus paid to said city or county."

Held, that this act does not conflict with any provisions of the *constitution of this state*, and especially that which declares that no person shall be deprived of life, liberty or property, without due process of law.

For the reasons: 1st. That the act does not allow judgments recovered under it to be collected in any other manner than is prescribed by the act, and such judgments create no lien upon property; 2d. That such judgments have not the attributes of ordinary judgments, and that none of the corporate property of the city can be seized or made liable for their payment; 3d. The burden of paying them falls upon the *tax payers* of the city, and not upon the city—the act being in effect a mere mode of *assessing* the damages occasioned by disorderly and riotous persons, unlawfully assembled, with a provision for their payment by the treasurer of the city or county, enabling the city or county, as a municipal corporate body, representing the people within its limits, to contest the amount of the recovery. The power of the legislature to impose the burden of *taxation* upon the citizens, for *local* as well as governmental purposes, cannot at this day be questioned.

Neither is the effect of this act to *impair the obligation of contract*, and thus violate the provision of the constitution of the United States.

For if the act does not deprive the city of any of its *property*, and the power to *tax* is a constitutional power, it necessarily follows that no *vested right* of the city can be disturbed, nor can the obligation of any contract be impaired.

The corporation of the city of New York is a *public corporation*. But the legislature can, at pleasure, change or suspend the political or governmental powers of the city, and may alter or amend any of the provisions of its charter, so long as there is no *deprivation of or interference with her vested rights of property*.

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New York General Term, March, 1864.

Before BARBOUR, MONELL and GARVIN, Justices.

THIS action was brought to recover damages for personal property destroyed by a mob in the city of New York, in July, 1863.

The defendants demurred to the complaint, alleging that the facts stated did not constitute a cause of action. The demurrer was sustained at special term, and the plaintiff appealed.

THOMAS B. BARNABY, *for appellant.*

JOHN K. HACKETT, *for respondents.*

By the court, MONELL, J. An action does not lie at common law against a municipal corporation, to recover for injuries to person or property caused by a mob. This was conceded by counsel, and is well settled.

The legislature of this state in 1855 (*Session Laws 1855, p. 800, ch. 428*), enacted that, "Whenever any building or other real or personal property shall be destroyed or injured, in consequence of any mob or riot, the city or county in which such property was situated shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for the damages sustained by reason thereof."

The act provides that actions may be brought and conducted in the same manner that other actions may be prosecuted by law, and directs that, "Whenever any final judgment shall be recovered against any such city or county, in any such action, the treasurer of such city or county shall, upon the production and filing in his office a certified copy of the judgment roll, pay the amount of such judgment to the party or parties entitled thereto, and charge the amount thus paid to said city or county."

The complaint alleges the unlawful assemblage on the 14th day of July, 1863, of a mob of disorderly and riotous persons, and the destruction of the plaintiff's property by

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the mob; and contains a statement of facts sufficient to constitute a cause of action against the defendants, if the act referred to can be sustained as a constitutional enactment.

The demurrer was sustained at the special term upon two grounds: 1st. That the act is in conflict with the constitution of this state, which declares that no person shall be deprived of life, liberty or property, without due process of law; and, 2d. That it impairs the obligation of contract within the prohibition of the federal constitution.

I will first consider the provision in our state constitution. The liability created by the act in question is in derogation of the common law, and was involuntarily imposed upon the defendants. The state, in the exercise of its sovereign power, holds the city responsible, without its consent, and without previous process of law, for the consequences of acts not committed by them, or by their authority or permission, but over which they could exercise no control, and which they had not the physical means to avert.

The decision at special term rested upon the ground that this legislative imposition of liability upon the city, by its consequences of a judgment for damages sustained by a citizen to his property, and the duty enjoined upon the treasurer to pay, does in effect and in fact deprive the defendants of their property, without due process of law, and is within the constitutional prohibition. Process of law does not mean legislative enactment, but condemnation by judicial decree; and the legislature cannot usurp the right and the power of the courts to determine every question concerning life, liberty or property.

It is a principle fundamental with our government, that the citizen shall be protected in the enjoyment of the blessings of life, liberty and property. Every man in surrendering his personal independence to the state sovereignty by yielding his support to the government, and by his obedience to its laws, has the right to expect reciprocal pro-

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tection. Hence, since we ceased to be colonies of Great Britain, it has always been a provision of the organic law of the state that none of its members shall be disfranchised or deprived of any of his rights or privileges, unless by the law of the land or the judgment of his peers.

If the consequences of a judgment recovered under the act in question, were to deprive the corporation of the city of New York of any of its "property," as a private body, or artificial person, or to subject any of its property to the lien of such judgment, or to render it liable to be sold, then the act in my opinion, would be clearly unconstitutional and void.

No property is taken by the terms of the act. The taking, if any there be, is only some compulsion to pay upon an involuntary liability. Money being property, the forced duty to pay money, as effectually deprives the corporation of its property, as if its real estate, or rents, or franchises were in terms to be seized. The corporation of the city of New York, represented by the mayor, aldermen and commonalty, is the owner of both real and personal property. This property may ordinarily, by process of law, be subjected to the payment of any debt which the corporation, as an artificial person, may lawfully contract. In this respect a municipal corporation is regarded as a natural person, capable of making contracts, of suing and being sued, and may be compelled in like manner to discharge its obligations.

If, therefore, an execution could be issued upon a judgment recovered under the riot act, and levied upon any of the "property" of the corporation, which it has obtained under its charters, or by subsequent purchase, and be sold in satisfaction of the judgment; or, if the city is compelled to pay its money to discharge these claims, then I am of opinion that the act would be exposed to the constitutional objection.

But the terms of the act forbid any such conclusion. Without such a statute, a sufferer by riot is remediless.

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The statute is therefore highly remedial, should be liberally construed, and must be taken entire. A part cannot be enjoyed and the residue rejected.

The exigencies which originated the act in question, were the not unfrequent unlawful assemblages of disorderly persons, suddenly and unexpectedly overpowering the ordinary constituted authorities, and in defiance of law, wantonly destroying life and property. During such periods, the citizen was powerless to shield himself, and looked in vain for help to the protecting arm of the law. His property was seized and swept to destruction, and his life imperilled or lost.

As under our free institutions, private interest must yield to the public good, so sometimes, in the due dispensation and distribution of justice, private wrongs, which the government was powerless to avert, may be redressed by removing the burden from the individual and placing it upon the whole community, or some large portion of it, such as might be culpable in not providing means to resist the assault, or most interested in defeating similar ones.

It seems to me that the legislature was influenced by these considerations in passing the act before us. They recognized the right of the citizen to demand of the people indemnity, where they had failed to shield from injury; and that the legislature, in the exercise of its power to levy taxes, designed that the people of the county or city whose authorities had failed to provide means of protection, should assume the burden of indemnity. It was not the intention of the legislature, by imposing a liability upon a county or city, to do more than to designate a body politic, representing the inhabitants of a district, who might be proceeded against to obtain redress for losses which it was proper should be borne by them. Except that the people cannot be sued, the liability could as well have been imposed directly upon them, instead of their representatives. Hence the act designates the city or county as the party to be

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liable. It is in effect a mere mode of assessing the damages occasioned by disorderly and riotous persons unlawfully assembled, with a provision for their payment by the treasurer of the city or county, and enabling the city or county, as a municipal or corporate body, representing the people within its limits, to contest the amount of the recovery.

The fire act of 1806, which authorized the mayor to direct the pulling down of buildings to arrest the progress of a fire (*Valentine's Laws*, 450, § 8), provided for an assessment of the damages to the owner, and after confirmation of the assessment by the mayor's court, directs the amount to be paid by the city. The riot act does no more than to require an assessment of damages, with a direction to the city treasurer to pay. And it does not follow, that because the city or county is designated by the act as the body to be proceeded against in ascertaining the amount of damages, that their municipal or corporate property is to be taken, or that it was intended that the damages when put into the form of a judgment, should be a lien upon such property. I cannot, therefore, believe that the legislature designed to give any other or greater force or effect to such judgments than is given in the act itself, or to prescribe or allow any other mode of satisfaction than the means therein pointed out. If it had been the design to create a lien upon the corporate property, or subject it to levy and sale, a direction to the treasurer to pay was wholly unnecessary. Such a lien, and a right to enforce it by sale, would have been incident to the judgment itself.

But the statute which fixes the liability, also provides for the satisfaction of the judgment. It directs the treasurer to pay, and to charge the amount to the city or county made liable. As I have said, the plaintiff has no right of action and no remedy, except under the statute (*Almy agt. Harris*, 5 J. R. 175), and if the statute does not furnish a complete remedy, he is without any.

In *Calkin agt. Baldwin*, (4 Wend. 667), an act of the legis-

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lature authorized B. to erect a dam across the Seneca river, and empowered any three judges of the common pleas to assess the damages of the owners of lands, which sum so assessed should be taken as a full compensation for such damages. MARCY, J., says: "The legislature have prescribed the mode in which the damages shall be ascertained, and in that mode only can they properly seek compensation."

So under the gaming act, which gave an action of "debt." it was held that the statutory remedy must be pursued in form as well as in substance, *McKeen* agt. *Caherty* (3 *Wend.* 494). In that case the statute created a right which did not exist before, and prescribed a remedy.

It is provided by statute (1 R. S. 315, §§ 13, 25), that fines imposed by a regimental or battalion court martial, are to be collected by a warrant issued by the president; and it was held in *The People* agt. *Hazard* (4 *Hill*, 207), they could be collected in no other way.

The chancellor, in *Renwick* agt. *Morris* (7 *Hill*, 575), says: where a new right is given, and a specific relief given for the violation of such right, the remedy is confined to that given by statute. So in *Smith* agt. *Lockwood* (13 *Barb.* 217), it is said, when a new right or the means of acquiring it are conferred, and an adequate remedy for its invasion is given by the same statute, parties injured are confined to the statutory redress.

If the statute under consideration provided no specific mode of payment, then, undoubtedly, the ordinary common law incidents necessary to render the judgment effectual would be inferred, although not mentioned in the statute. And even where the provision in a statute designed to give effect to the power, is in such general terms as to render the design doubtful or uncertain, it should receive a liberal construction towards effectuating the power. *Bouton* agt. *City of Brooklyn* (15 *Barb.* 375), and *Strong, J.*, in *Dudley* agt. *Mayhew* (3 *Coms.* 15), says: "The principle that when

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a statute confers a right and prescribes adequate means for protecting it, the proprietor is confined to the statutory remedy, is conformable to the manifest intention of the legislature in such cases, and has therefore been properly settled in the courts of England and in this country."

That the legislature did not intend to give any other effect to their judgments than is contained in the act, gains additional force from the duty of the court in construing their acts, even in doubtful cases, to presume that the legislature did not intend to take any individual or private property against a constitutional usurpation (*French agt. Kirkland*, 1 *Paige*, 117).

The corporate capacity of "counties" is prescribed by statute (1 *R. S.* 364). They are declared to be bodies corporate; they may sue and be sued, and may purchase and hold real and personal property; but their powers as a body politic can only be exercised by the board of supervisors.

The liability of "counties," under the act in question, is the same as that of "cities," and judgments must be satisfied in the same manner. An execution upon a judgment against a county, or against the supervisors thereof, cannot be issued, nor can the corporate property be sold (2 *R. S.* 497, § 107). So far, therefore, as regards counties, which are protected from execution, in all cases, the direction to the treasurer to pay was quite unnecessary. In cities, however, which enjoy no such immunity, it was necessary to guard against the disturbance of any corporate rights of property. And I think the legislature has done so, by providing for payment out of the city treasury (which treasury under the authority conferred by law from time to time upon the city, to levy taxes upon the taxable property of the citizens of the city, may be replenished), and by not providing any other mode of payment.

If I am right in my conclusions that a judgment recovered under the act creates no lien upon property; that no

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property of the corporation can be subjected to its payment, and that the burden of paying falls upon the tax payers of the city; then it follows, I think, that the act is not unconstitutional, unless levying a tax to reimburse the treasury is a taking of property within the meaning of section 6 of article 1 of the constitution.

The power of taxation both in cities and counties, is conferred by the legislature in either general or special laws. General laws have been enacted giving authority to boards of supervisors to raise money by tax. (1 R. S. 366, § 4; *Laws* 1849, ch. 194, § 34.)

In this city no general authority exists. But the legislature may, from time to time, authorize the levying of a tax to reimburse the treasury, or to provide for the payment of the expenses and liabilities of the city. An act empowering the city to raise money by tax, is annually passed by the legislature.

The power of the legislature to impose the burden of taxation upon the citizens, cannot, I think, at this day be questioned. It is one of the duties which the citizen owes to the state, to contribute to its support; and the state, in virtue of the right of eminent domain, may compel the contribution. The compensation which the citizen receives, or is supposed to receive, is in the protection of the government, the security of life and liberty, and the enjoyment of property.

All right of property as regards its mode of enjoyment, burdens, alienations, transmission or sacrifice, for the public good, depend upon positive municipal regulations of the sovereign power. The constitution only intended to forbid the seizure and appropriation of private property for public uses, when it would thereby remain the private property of the community as a body politic or corporate, although enjoyed by the public. Taxation is not so much the exercise of the right of eminent domain as a sacrifice to public wants or necessities. It is not the resumption of property

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by the state, compensating the owner for its loss, but the appropriating it at once to some public purpose. The state, or its officers, are only invested momentarily or temporarily in order to discharge obligations incurred for a public necessity. The public necessity, to which the payment of a tax is a sacrifice, must be determined alone by the legislature; the elements of judgment, as to its existence or quantum, are so minute and various, that a judicial body cannot take cognizance of them.

The limitation of the region of taxation to raise funds for a particular purpose, does not affect the constitutional right any more than the regulation of the persons or property to be taxed. Either the legislature is invested with sovereign, unlimited, unquestionable power, or every individual and every kind of property is to be taxed alike, or according to the benefits to be received, and courts cannot determine whether a tax is unconstitutional by reason of the persons to be taxed or exempted. The power to tax for local as well as governmental purposes, has always been upheld by the courts as being necessary to the due administration of the government, and as imposing no new or improper burden upon the citizen.

In *Thomas agt. Leland* (24 Wend. 65), the question arose under an act of the legislature, levying a tax upon property in Utica, to pay the cost of a change of terminus of the Chenango canal. Neither the city of Utica, nor the inhabitants thereof, were liable for such costs. The court held the act to be constitutional. There the act subjected the taxable property of Utica to the payment of a debt, and shifted the burden from individuals to the tax payers.

In *Morris agt. The People* (3 Denio, 381), the act sought to be invalidated, declared that the salaries of the judges of the court of sessions were county charges, and directed the supervisors to pay; and it was held, that although the appointment of Judge LYNCH, one of the session judges, was illegal, the act directing the payment of his salary was

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valid. Neither the city or county could have been made liable except under the act.

In *The People agt. Mayor, &c., of Brooklyn* (4 Com. 419), the whole subject of taxation for local purposes received the careful consideration of the court. Judge RUGGLES, in that case, says (p. 422): "The right of taxation and the right of eminent domain, rest substantially on the same foundation. Compensation is made when private property is taken in either way. Money is property. Taxation takes it for public use, and the tax payer receives, or is supposed to receive his just compensation in the protection which the government affords to his life, liberty and property, and the increase of the value of his possessions, by the use to which the government applies the money raised by the tax." The assessment in that case was for a local improvement, the benefits of which were enjoyed by a few only of the citizens of Brooklyn. But the court upheld the assessment on the ground that an assessment, being a tax, it was not in conflict with the constitution to confine the tax to any prescribed limits.

In *Bank of Rome agt. Village of Rome* (18 N. Y. R. 38), an act was sustained, which authorized the defendants to subscribe to the capital stock of a railroad company, and to issue their corporate bonds therefor.

In *Brewster agt. The City of Syracuse* (19 N. Y. R. 116), J. and W. Ley had constructed a sewer, under a contract with the city of Syracuse, and had been paid in full. Afterwards an act was passed directing the common council of Syracuse to assess and collect \$600, and to pay it to the Leys, as an additional compensation. The Leys before the act had no claim whatever against the city, and the charter prohibited the city from paying anything above the contract price. But the court says: "The expense was imposed on that part of the citizens interested in the improvements, by virtue of the discretionary power of the

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legislature to impose the public burdens on those who in its judgment ought to bear them."

I will refer on this point to but one case more, that of *Gifford agt. The Supervisors of Chenango County* (13 N. Y. R. 143). In that case it was attempted to restrain the supervisors from levying and collecting from the taxable property of the citizens of a town, a sum awarded to Cornell & Clark, under an act of the legislature, and for which, except under the act, the town was in no way liable. Judge DENIO there says: "The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires, or will be promoted by it, and it is the judge of what is for the public good. It can, moreover, under the power to levy taxes, apportion the public burdens among all the tax paying citizens of the state, or among those of a particular section or political division. It is well settled that the authority to raise money by the exercise of the taxing power is not in conflict with the constitutional provisions protecting private property from seizure."

The only conceivable difference between the cases to which I have referred and the question I am considering is, that the riot act does not authorize the levying of a tax to place funds in the treasury to pay the judgments. That difference may affect the efficiency of the law; may deprive the plaintiff of the means of obtaining satisfaction of his judgment until further legislation is had, but it does not render the law invalid. It rather sustains it in the view taken by the learned justice below. My conclusion upon this branch of the case is, that the act does not allow judg-

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ments recovered under it to be collected in any other manner than is prescribed by the act; that such judgments have not the attributes of ordinary judgments, and that none of the corporate property of the city can be seized or made liable for their payment. The burden of paying them falls upon the tax payers of the city, and not upon the city. The act, therefore, does not conflict with any provisions of the constitution of this state.

The second ground is, that the effect of the act is to impair the obligation of contract.

I agree with the learned judge at special term, that the charter of the city is so far a contract between the state and the corporation, that its right to hold and enjoy its property cannot be impaired or destroyed by subsequent legislation. The constitution does not exempt charters from legislative control or interference, whenever, upon principles of law, such control or interference would be valid. Their recognition does not impair the power to alter, amend, or modify, so long as no grant of property or franchises, coupled with a right of property, is taken from them. Nor does the state lose the right of making laws concerning chartered corporations, so long as they remain *publici juris*. The grant is therefore subject to remedial legislation, and amenable to general laws. And as an illustration of this principle, I may observe that the charter of the city of New York has repeatedly been subjected to change, both by the colonial government and by our state legislature.

I have endeavored to show that the act before us does not deprive the city of any of its property, and that the power to tax is a constitutional power. If I have succeeded in establishing those propositions, then it necessarily follows that no vested right of the city has been disturbed, nor has the obligation of any contract been impaired.

In the *Charles River Bridge case* (11 Peters, 420), the right of the legislature to interfere and take away a vested right,

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was clearly and distinctly recognized and decided. There the emoluments of a toll bridge had been enjoyed under a special charter for more than forty years, yet the legislature chartered a rival company, with corporate rights and powers injurious to those of the old company. The right was admitted to be vested in the old company, but it was not doubted that the legislature could take it away.

The *Dartmouth College case* (4 *Whea.* 519), is relied on as an authority that the legislature cannot interfere with vested rights. But it will be seen that the distinction between public and private corporations is marked with emphasis by the eminent judges who delivered opinions in that case. The extent of that decision is, that an eleemosynary corporation, founded by private contributions for the distribution of a general charity, is not an instrument of government, whose officers are public officers, but a private corporation, whose charter is a contract between the donors' trustees, and the government, founded on the consideration of public benefit to be derived from the corporation, which cannot be altered, amended or modified, without the consent of the corporation.

The corporation of the city of New York is a public corporation, (2 *Kent's Com.* 305; *People* agt. *Morris*, 13 *Wend.* 325; *Purdy* agt. *People*, 4 *Hill*, 384,) deriving its corporate rights first from the crown of Great Britain, and since from the recognition of those rights by our state constitutions. Yet no one I think can doubt that the legislature can at pleasure change or suspend the political or governmental powers of the city (for these are not vested rights as against the state, and may therefore be abrogated by the legislature), and may alter or amend any of the provisions of its charter, so long as there is no deprivation of or interference with her vested rights of property.

This power of the legislature over charters, was recently fully discussed and considered in the court of appeals, in the *Chenango Bridge Co.* agt. *The Binghamton Bridge Co.*

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(26 *How. Pr. R.* 124, 297), where the power is fully recognized.

The English statutes (13 *Ed. I.*, and 27 and 28 *Eliz.*), giving remedies for injuries caused by a riot, to which we were referred, furnish no aid in determining the constitutional question arising under ours. Parliament is the highest law making power of Great Britain, and it can conflict with nothing. Our legislature is limited and circumscribed by a higher law, which they, as well as the courts, must obey.

The question before us was directly involved in the case of *Wolfe agt. Supervisors of Richmond Co.* (11 *Abbott*, 207). The learned judge who decided that case, and whose opinions are always entitled to great weight, sustained the act in a well reasoned opinion, which it seems to me is supported in principle and by authority. Especially by the terse and direct annunciation of Mr. Senator VERPLANCE, 1840, in *Stone agt. The Mayor &c.* (25 *Wend.* 181), who says: "The legislature might with perfect justice, if sound policy was thought to require it, make our towns or counties severally responsible for damages hereafter arising from robbery within them, or from public tumults, on the principle of the English riot act."

I have thus given this question the careful examination which its importance deserves. I have cast aside all those presumptions which go to sustain an act until its invalidity plainly appears; and I have looked attentively into every part of it, tracing its probable and even possible effects upon the city, with a jealous regard for its corporate rights, to see if I could find any power improperly exercised by the legislature, and I have found none.

We have nothing to do with either the wisdom, policy or justice of the law. Those questions were with the legislature, not with us. My conclusion is, that the act does not conflict with any provision in the state or federal constitution, and is a valid law.

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The judgment of the special term should be reversed with costs, and leave given to the defendants to withdraw the demurrer, and to answer on payment of costs.

GARVIN, J. I concur.

NEW YORK COMMON PLEAS.

HENRY DELAFIELD agt. EDWARD D. JAMES, and wife.

Where the complaint set forth an agreement whereby the plaintiff agreed to purchase of the defendants certain real estate—\$250 were to be paid on the execution of the agreement, and the balance on the delivery of the deed—and then set forth the following clause: "If the counsel for the party of the second part shall not find the title good and sufficient, this agreement shall be void, and the parties of the first part shall return the said \$250."

Held, the plaintiff having commenced his action to recover back the \$250, of the defendants, upon his counsel not finding the title good, that the defendants were concluded by the terms of the agreement from drawing in question wherein the title was insufficient.

New York, Special Term, July, 1864.

MOTION to make the complaint more definite and certain, and to strike out certain parts thereof as irrelevant.

The complaint set forth an agreement whereby the plaintiff agreed to purchase of the defendants certain lots in Twenty-ninth street. Two hundred and fifty dollars were to be paid on the execution of the agreement, and the balance on the delivery of the deed. The agreement then continued: "If the counsel for the party of the second part shall not find the title good and sufficient, this agreement shall be void, and the parties of the first part shall return the said \$250."

The complaint alleged the payment of the \$250, that the purchaser instructed his counsel to examine the title, which was done, that he did not find the title good and sufficient, and that the defendants was thereupon notified that the plaintiff declined to complete the purchase and

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required the return of the \$250, which the defendants refused to do.

The complaint alleged facts showing special damages in the expenses incurred in examining the title, in the preparation of plans for building on the lots, and in the loss of the bargain, and tending to show fraud on the part of the defendants in entering into the agreement, and claimed damages therefor.

The defendant, Edward D. James, now moved to make the complaint more definite and certain by stating in what particulars the title to the lots was insufficient, and to strike out the claims for special damages as irrelevant or redundant.

J. B. ELWOOD, *for the motion.*

LEWIS L. DELAFIELD, *in opposition.*

I. The inquiry in what particulars the title is insufficient cannot arise in this case. The contingency provided against by the agreement has arisen. The counsel agreed upon finds the title bad, and the agreement is void by its terms. This clause is the contract of both the vendors and the vendee. There is nothing unreasonable in it. There might be circumstances which would make it desirable for both parties. Without it the purchaser might compel the vendors to convey what title they had, and to accept a reduced amount for the purchase money; with it he cannot. The parties have left the question whether the title was good or bad to the counsel of the purchaser, and the court will not now make a new agreement for them (*Williams agt. Edwards*, 2 *Simons'* R. 78.)

The court here stopped the counsel and stated that he need not answer the argument of the defendants' counsel, in favor of striking out any parts of the complaint as irrelevant, and afterwards rendered the following opinion:

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BRADY, J. The defendants agreed that, if the counsel for the plaintiff should not find the title good and sufficient, the agreement to purchase should be void, and that they would return the consideration paid. I see no reason why they should not be held to this agreement. If the counsel for the plaintiff collusively declared the title bad, an action might be maintained against him and the plaintiff. There is no pretence of this, however. The defendants were not coerced to make the agreement signed, and having voluntarily executed it they must assume all its obligations. The plaintiff had a right to protect himself against the contingency of a bad title, and to relieve himself from the trouble or delay of making it good, even if the defendants had the power to supply the omissions or correct the defects. He has done so. The case is analogous to *Williams agt. Edwards* (2 *Simons' R.* 78), and the motion, therefore, to make the complaint more definite and certain must be denied. Ordered accordingly.

SUPREME COURT.

MICHAEL WALSH, respondent agt. JOHN KELLY, sheriff.

In an action by W. for taking and detaining goods, brought against a sheriff who justified under process in favor of the creditors of an insolvent firm, M. M. & Co., who had transferred the property levied on to W., in payment of an alleged claim of W. against M. M. & Co., the charge of the judge wherein he said:

1. If the goods had been transferred to W. with the intent to hinder, delay or defraud the creditors of M. M. & Co., &c., then the transfer is void and the creditors of M. M. & Co. could attach the goods.

2. A transfer of goods by one who is indebted or insolvent, or whether insolvent or not, with the premeditated design and intent to defraud some creditor of his, and to deprive him of the ability to collect his debt, may be under such circumstances, that if the goods be followed, the law will regard it as an actual fraud between him and his vendee.

3. An illustration of this may exist in a combination between two, one to sell goods and the other to buy them for the very purpose of preventing a third person from collecting his debt, and it may be done where one of the parties shall

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be a creditor, if so done with the intent and design to defraud; such a charge is a valid exposition of the law in answer to requests of the counsel for the sheriff, who desire the judge to charge:

First. That the transfer of property to hinder, delay or defraud the creditors of the person making the transfer, was fraudulent and void, even if made upon the consideration of an honest debt, provided the transferee had notice of the fraudulent acts of the person making the transfer; and,

Second. That notice of such facts as would lead a prudent person to inquire into the motives of the vendor, was sufficient evidence in that respect.

The vendee's knowledge of facts and circumstances tending to prove a fraudulent motive on the part of the vendors, need not to be sought for or inferred from obscure or doubtful indications in the case at bar. If such a motive existed the evidence implicated the vendee as much as the vendors.

Where the question was whether there was an agreement between them to defraud the other creditors of the vendors, or else the sale was for the honest purpose only of satisfying the debt due to the plaintiff, in such case there is no room to charge the plaintiff with notice of a fraudulent intent on the part of the vendors, from facts and circumstances, where it is plain that if there was any such intent the plaintiff was "art and part" in it. Where the judge also directed the jury to inquire whether the vendors had a fraudulent intent, and if they had, that the sale was void, and so charged, without the qualification, that the sale was not supported by the consideration of an honest debt, or that the vendee had notice from facts and circumstances of a fraudulent motive on the part of the vendors, his charge, was in these respects, more favorable than the requests.

The judge is right in refusing to charge a proposition based on facts which are questions for the jury in the cause to determine.

A firm composed of three members has no right to apply its property to the payment of the debts of two of its members. If it is so transferred, it is subject to seizure under attachments issued at the suit of creditors of the whole firm. A question put to a witness, "Were you a member of the firm of W. & Co.?" does not relate only to a conclusion of law, if it did, the question was clearly inadmissible; but there might have been an agreement on the subject, in which case the inquiry would have been competent and could not be excluded.

The answer of the witness, that he did not consider himself a partner, amounted to nothing as evidence, it being his opinion. It would be stricken out on request.

A question put to the witness, "Did your firm of M. M. & Co. own the said stock of goods, or any interest therein?" calls for a fact and not a conclusion merely. It was the office of the cross-examination to discover whether the witness stated in his answer, a fact or conclusion of law. Both the above questions were admissible.

In an issue of title as between an alleged fraudulent vendee and a sheriff, levying by virtue of attachments against the alleged fraudulent vendor, it is improper to inquire into the character of certain goods taken from the store of the vendors to the store of another firm in New York. The character of those goods could have no apparent relation to the title of the goods transferred to the plaintiff.

On inquiry, also, whether one of the alleged fraudulent vendors made an application to a party for a loan of money to his firm, and stated his firm must fail unless they obtained the loan, was improper, because, even if the plaintiff did know that the firm of M. M. & Co. was in failing circumstances, yet that knowledge will not *per se* render it unlawful for him, if he was a creditor, to receive

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a transfer of goods from the failing firm in satisfaction of a demand. No legitimate inference can be drawn from the proposed evidence that the transfer to the plaintiff was fraudulent.

A judgment record in such an action, after verdict, in favor of plaintiff, valuing property at \$2,750, and for \$401 damages in which the award is made for \$3,151 damages and costs, is bad in form and must be corrected. But the error is not ground for a new trial where the verdict is correct. The record, in such case, may be amended by the general term, after appeal and argument, so as to conform to the Code. Form of such an amendment and order given.

New York, General Term, May, 1864.

LEONARD, P. J., SUTHERLAND and CLERKE, Justices.

THIS case came up on appeal from a judgment entered in an action for taking and detaining goods of the plaintiff of the value of \$3,000. The cause was tried before Mr. Justice MARVIN and a jury, at the June circuit in New York, 1862. The jury rendered a verdict in favor of the plaintiff, valuing the property at \$2,750, and awarding damages in addition, to the amount of \$401, besides costs. No application was made at special term to set aside the verdict, but appeal was taken direct from the judgment to the general term. On the trial the defendant justified the taking as sheriff of the city and county of New York, under divers attachments and executions issued thereon, out of the marine court, by the creditors of Mooney, Manley & Co., a firm shortly before that time in business in the city of New York, against said firm, and the allegation was made that the property levied on was that of the said Mooney, Manley & Co., and not of the plaintiff. Much evidence was given on both sides, but, from the general bearing of the evidence, the following facts appeared, viz :

Prior to 1857 the plaintiff had been a merchant doing business in London under the name of M. Walsh & Co. He consigned goods to G. & F. Mooney of New York, to sell for him on commission. Some evidence was given tending to show that some of these consignments had been made to successors of the last named firm, viz : to Mooney, Manley & Co. The consignments amounted to over \$100,000.

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In 1857 M. Walsh & Co. suspended payment, owing to their English creditors a large amount. After their failure the plaintiff came out to this country, as he claimed, to look after his consignments and to settle them up.

He was occupied in this for a long while with G. & F. Mooney & Co., and with their successors Mooney, Manley & Co. This last firm was composed of the members of the house of G. & F. Mooney, and also of one Manley, who had been a clerk of the last named firm.

This clerk brought in no capital to the new firm, but it appeared that the stock in trade of G. & F. Mooney including some \$3,000 in value of the consigned goods belonging to the plaintiff, went into the hands of and composed the capital on which the firm of Mooney, Manley & Co. did their business.

After considerable delay in settling their accounts, the parties, on or about the 22d of June, 1858, fixed upon the balance due on those consignments to the plaintiff, to be \$12,845.90. To pay up this amount, notes were given to the plaintiff, made by G. & F. Mooney, to Mooney, Manley & Co.'s order, endorsed by them.

These notes were unpaid at maturity as the plaintiff claimed, because in the meantime George Mooney, of the firm of G. & F. Mooney, had been sued by the English creditors of M. Walsh & Co., as one of that house, but finally a compromise was effected at three shillings and nine pence on the pound for those debts, and there being no reason for any further delay, in December, 1859, Mooney, Manley & Co., at that time (however in a failing condition), transferred a portion of their stock in trade over to the plaintiff, in payment of the aforesaid balance found due to him. The plaintiff proved that with these goods, and some means of his own, he started a retail business at 863 Broadway, in his own name, conducting it as his own business and on his own account.

He bought goods to a large amount, of various mercan-

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tile firms in this city, and was apparently in full business when the defendant made his levies on the stock in question. It appeared further on the part of the plaintiff, that a great part of the goods levied on were identified as goods purchased by the plaintiff in that business, of different firms in New York with whom he dealt and who knew nothing about Mooney, Manley & Co.

The defendant showed that the plaintiff's business in London was conducted under the firm of M. Walsh & Co.

It was started in 1855 or 1856, and about eight months after it commenced George Mooney, one of the defendants in the attachment, invested £1,000 in the London business. He did not consider himself a partner, but his reason for so placing his money was because he desired thereby to have a favorable influence on M. Walsh & Co.'s house in making consignments to G. & F. Mooney. The former had the use of the money, and the latter the control of the goods consigned to G. & F. Mooney by M. Walsh & Co.

There were a number of exceptions taken to rulings on questions of evidence on the trial which are noticed in the opinion. The counsel for the defendant then put divers requests to charge, to the judge, which are noticed in the opinion. The court delivered his charge, the material parts of which, are noticed in the opinion, and refused to charge any further on the propositions submitted, or other than he had charged. At the close of the charge the appellant's counsel simply excepted to the refusal of the court to charge any further on the propositions submitted, and also excepted to the charge as made by the court, and to each and every part thereof.

The jury found, as before stated, and on perfecting judgment the plaintiff entered it merely for the amount of the verdict, calling same damages.

A. J. VANDERPOEL, *for appellant.*

DENNIS McMAHON, *for respondent.*

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By the court, LEONARD, J. The principal questions argued before us in this case require an examination whether the judge at the trial has fully and sufficiently presented to the jury in his charge, certain abstract propositions of law, to which his attention was called by several requests of the counsel for the defendant.

An exception was taken to the charge in response to the second and third requests. Those requests contained substantially the propositions: First—That the transfer of property to hinder, delay or defraud the creditors of the person making the transfer, was fraudulent and void, even if made upon the consideration of an honest debt, provided the transferee had notice of the fraudulent acts of the person making the transfer; and, Second—That notice of such facts as would lead a prudent person to inquire into the motives of the grantor, was sufficient evidence in that respect.

The judge charged, "if the goods had been transferred to Mr. Walsh, with the intent to hinder, delay or defraud the creditors of Mooney, Manley & Co., &c., then the transfer is void, and the creditors of Mooney, Manley & Co., could attach the goods."

And again, "a transfer of goods by one who is indebted or insolvent, or whether insolvent or not, with the premeditated design or intent to defraud some creditor of his, and deprive him of the ability to collect his debt, and this may be under such circumstances, that if the goods be followed, the law will regard it as an actual fraud between him and his vendee."

The judge then gives an illustration by a combination between two, "one to sell goods and the other to buy them, for the very purpose of preventing a third person from collecting his debt. * * * It may be done," he says, "I have no doubt, where one of these parties shall be a creditor, if it is done with that intent and design."

The charge embodies the propositions of the defendant's

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counsel except as to the notice to be derived from facts and circumstances of the vendor's fraudulent motive, and as to that, there is nothing in the case calling for the instruction asked for.

The plaintiff's knowledge of facts and circumstances tending to prove a fraudulent motive on the part of the vendors, need not be sought for or inferred from obscure or doubtful indications in this case. If such a motive existed, the evidence implicated the vendee as much as the vendors.

There was an agreement between them to defraud the other creditors of the vendors, or else the sale was for the honest purpose only of satisfying the debt due to the plaintiff. There is no room to charge the plaintiff with notice of a fraudulent intent on the part of the vendors, from facts and circumstances, when it is plain that if there was any such intent, the plaintiff was "art and part" in it.

The judge directed the jury to inquire "whether the vendors had a fraudulent intent, and if they had, that the sale was void, and this without the qualification that the sale was not supported by the consideration of an honest debt," or that the vendee had notice, from facts and circumstances, of a fraudulent motive on the part of the vendors.

The charge was more favorable for the defendant than the requests, in these respects. The defendant also insists that the judge did not properly meet the fourth and sixth requests made by him. The fourth request assumes that the property of Mooney, Manley & Co., was transferred to the plaintiff, in payment of a debt due from G. & F. Mooney, or by G. & F. Mooney & Co. Whether Mooney, Manley & Co., were indebted to the plaintiff, was a question of fact for the jury.

The judge charged in conformity to this request in every other respect, viz.: that a firm composed of three members had no right to apply the property of that firm to the payment of the debts of two of its members. The sixth

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request also assumes that the property in question was so transferred, and was subject to levy under the attachments held by the sheriff.

The judge properly charged, so as to give the question of transfer to the jury, viz.: if the property of Mooney, Manley & Co., was transferred to the plaintiff in payment of the debts of G. & F. Mooney, it was subject to seizure under the attachments, if the persons who set the sheriff in motion were creditors of Mooney, Manley & Co. The charge appears to have been correct in these respects.

The eleventh and twelfth requests are also made the subjects of an exception. Both of these requests call upon the court to withdraw from the jury two subjects which were properly within their province, as questions of fact.

1. That George Mooney was a member of the firm of Michael Walsh & Co., and also of Mooney, Manley & Co.

2. That the transfer of the property of Mooney, Manley & Co., to the plaintiff, was for the benefit of one of the members of that firm, and as against their creditors, was fraudulent and void.

The judge would not have been justified in taking these inquiries from the jury, and the exceptions here are not well taken. The witness, George Mooney, was asked, "Were you a member of the firm of Michael Walsh & Co.?" This question was admitted against the objection of the defendant, and an exception was taken. Such an inquiry does not certainly relate only to a conclusion of law; if it did, the question would be clearly inadmissible. There might have been an agreement on the subject, the inquiry might have been competent, and in such case it could not be excluded.

The witness answered that he did not consider himself a partner. It amounted to nothing as evidence, and was his opinion merely, without professing to state how the fact was. No doubt it would have been stricken out if the defendant had requested it. The same answer applies to

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the exception taken to another question, addressed to the same witness, viz.: "Did your firm of Mooney, Manley & Co., own the said stock of goods, or any interest in them?" Under ordinary circumstances this inquiry would call for a fact, and not for a conclusion merely. It was the office of a cross-examination to discover whether the witness stated in his answer a fact or a conclusion. These questions were admissible.

The defendant inquired of Mr. Eyland, a witness for the defence, as to the character of certain goods taken from the store of Mooney, Manley & Co., to the store of another firm in the city of New York. The question was excluded on the plaintiff's objection, and the defendant excepted. The ruling was correct. The character of those goods could have no apparent relation to the title of the goods transferred to the plaintiff. The defendant also sought to inquire whether George Mooney made application to a party then a witness on the stand, for a loan of money to Mooney, Manley & Co., and stated that the firm must fail unless they obtained the loan, and that they did in fact fail in a few days. The evidence was excluded, and the defendant excepted.

It was urged by the defendant, that if Mooney was a partner of the plaintiff, he had knowledge of facts that ought to put him on inquiry. The knowledge that a firm is in failing circumstances, will not *per se* render it unlawful for a creditor to receive a transfer of goods from the failing firm in satisfaction of a demand.

No legitimate inference could be drawn from the proposed evidence that the transfer to the plaintiff was fraudulent. These exceptions are none of them well taken. There are other exceptions in respect to the admission or exclusion of evidence, but these were all that were urged before us as ground for a new trial.

The judgment should be affirmed with costs. The judgment record is bad in form, but the verdict is correct, and

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the record may be amended so as to conform to the Code.

The order to amend was entered in the following form, after reciting the decision of the general term, it proceeded thus :

"Now on motion of, &c., it is ordered that the said judgment roll, entered on the verdict below in this cause be amended in the award of judgment *nunc pro tunc*, so as to read as follows, to wit : ' This action having been tried on the issues of fact joined therein, and the jury having found a verdict finding the property in the plaintiff, and the value of the said property at \$, and assessing the plaintiff's damages for its detention at \$. Now on motion of, &c., it is adjudged by the said court that the plaintiff, M. W., recover of the defendant, I. K., sheriff of the city and county of New York, the possession of the said property, together with \$ damages for the detention thereof, and also \$ costs of suit as adjusted. But in case a delivery of said property cannot be had, then that the said plaintiff do recover of the said defendant judgment for the said assessed value, and for the said assessed damages, with said costs as adjusted. Which said assessed value, damages, and costs and interest, amount in all to \$.'"

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SUPREME COURT.

JOHN OVENSHERE, respondent agt. HORACE ADEE, appellant.

Where an action is brought in a justice's court, to recover damages, as claimed in the complaint at \$100, and on the trial a verdict is rendered for the plaintiff for \$30—no evidence being given which laid the damages beyond \$50. On *appeal* to the county court, the cause is properly triable there before a jury; as it is the amount of the *claim* in the pleadings, and not the amount of *recovery* in the court below, which confers jurisdiction on the county court under § 352 of the Code.

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Seventh Judicial District, General Term, December, 1863.

JOHNSON, J. C. SMITH and WELLES, Justices.

THIS was an action originally commenced in a justice's court to recover a claim of \$100, alleged in the complaint for a breach of warranty in the exchange of horses. The cause was tried before a jury on the 20th day of August, 1862. A verdict was rendered for \$30 damages for the plaintiff, for which judgment was entered, with five dollars costs.

On the trial before the justice, the proof of damages ranged from \$25 to \$50, but no witness went beyond \$50.

The defendant appealed from the judgment to the Yates county court, and at a term of said court held on the 23d day of April, 1863, the plaintiff, or respondent moved the appeal for trial as an issue of fact before a jury. The defendant, or appellant objected to such trial on the ground, 1st. That the subject matter in litigation between the parties in said action does not exceed the sum of \$50. 2d. That the verdict of the jury in the court below in this case, is the only legitimate evidence of the amount of the claim litigated in the court below; and that verdict being only \$30, the county court has no jurisdiction to re-try the cause by a jury. 3d. That the amount of the claim as made out by the plaintiff's witnesses in the court below, did not exceed the sum of \$50; and, 4th. That there is no evidence in the case as appears by the justice's return, that the amount of the plaintiff's claim litigated in the court below exceeds \$50. The court overruled the objections, and ordered the cause to proceed to trial before a jury, to which the defendant excepted.

On the trial in the county court, the plaintiff did not, by his own testimony, claim damages to exceed \$50, or by any other witness. And when he rested, the defendant moved the court to arrest the trial on that ground, which was refused by the court, and the defendant excepted. The jury in the county court found a verdict for \$50 in favor of the plaintiff, upon which judgment was entered, with

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\$58.95 costs and disbursements, making \$108.95 in all, from which the defendant appeals to this court.

D. J. & M. J. SUNDERLIN, *for appellant.*

I. The amount of the claim litigated in the justice's court, being only \$30, as appears by the verdict of the jury, the county court had no authority or jurisdiction to re-try said appeal before a jury (*Session Laws of 1862, p. 853, § 23, amending § 352 of the Code*).

No witness swore upon the trial before the justice that the amount litigated exceeded \$50. Neither did any witness in the county court swear that such amount exceeded \$50. But the plaintiff himself estimated the amount at \$50.

It is not the amount that a party may claim in his complaint that gives the court jurisdiction to re-try, but it is the value of the claim in fact litigated. Otherwise, the jurisdiction of the county court depends upon a mere fiction in pleading, at the will of the party.

II. The county court erred in receiving evidence under objection as to the size of other horses, and how they performed before the wagon, in, or with which the mare in question was tried. She never had been known to be baulkey or vicious before the plaintiff got her. The evidence in regard to the wagon was given by the defendant to show that the plaintiff did not give the mare a fair trial. Whatever other horses might have done before the same wagon, was in no way admissible as a reply to the defendant's proof. The jury were doubtless misled by such evidence, and for this error alone the judgment should be reversed.

DANIEL MORRIS, *for respondent.*

I. The finding of the jury being upon questions of fact is conclusive, and cannot be reversed on appeal.

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II. The court committed no error in its rulings upon the admission of evidence.

1. The testimony objected to was responsive to the testimony of the appellant's witness, that the thills in which the horse in question was driven were of unsuitable length and size. This was not only the best, but it was the only way in which to rebut such testimony, and to show that the thills were of suitable length, and in no way occasioned the vicious conduct of the horse complained of.

If this testimony were objectionable at all, the appellant failing to point out wherein the impropriety consisted, cannot now be allowed to take advantage of its admission. (*Paige* agt. *Fazackerly*, 36 *Barb.* 392, 401; *Merritt* agt. *Seaman*, 6 *Barb.* 330, 335.)

III. Did the court err in allowing the cause to be re-tried? This is the only question of difficulty or importance in the case, and its answer requires an interpretation of the 352d section of the Code. We say that the words, "the amount of claim or claims of either party, litigated in the court below," can be determined only by an examination of the process and pleadings; that the main design of the statute was to operate in some measure as a check upon the practice which prevails to so great an extent in justice's courts, of claiming in the summons and complaint, fictitious damages. In the case at bar, the claim in the summons and complaint was \$100. The defendant, for answer, denies the claim, and sets up a counter-claim of \$100; that both parties failed to prove the damages stated, does not affect or negative the fact that the amount thereof was claimed in litigation. This view is in accordance with the uniform practice of courts of limited jurisdiction; that jurisdiction is determined by the amount claimed in the summons and pleadings. (*Thayer* agt. *Hannah*, 6 *Hill*, 613; *Rockwell* agt. *Perine*, 5 *Barb.* 573; *Bellinger* agt. *Ford*, 14 *Barb.* 250.)

IV. The damages in this case were for a breach of warranty—were unliquidated. The proof given in reference

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thereto, consisted of the mere opinions of the witnesses, and of course only approximates to the actual damages. Hence their opinions do not actually determine the amount claimed as in litigation. The jury were not bound by them, and might have disregarded them.

By the court, JAMES C. SMITH, J. The principal question in this case is whether the county court erred in overruling the defendant's objection to a new trial of the cause by a jury, in that court, on appeal. The question involves a construction of the language of section 352 of the Code, which provides that on appeal from a justice's judgment to a county court, a new trial shall be had in the appellate court, "when the amount of the claim or claims of either party litigated in the court below, shall exceed fifty dollars." In the case at bar, the complaint stated a single cause of action for a breach of warranty in the sale of a horse, and claimed damages to the amount of one hundred dollars. The answer denied the complaint, and set up a counter-claim for one hundred dollars damages, which, however, was withdrawn, and was not litigated. The damages being unliquidated, witnesses were called to testify respecting their amount, and the highest estimate of damages given at the trial was fifty dollars. The plaintiff recovered a verdict of thirty dollars in the justice's court. As the amount of the claim in the complaint exceeded fifty dollars, and the whole of such complaint was liquidated—that is—was put in issue, and the issue was tried, I think the ruling of the county court accords with the intent as well as the letter of the statute. The language seems to me very clear and explicit, and not properly susceptible of any other interpretation than that given to it by the court below.

The defendant's counsel insists however, that the amount of the verdict in the justice's court should control. But to adopt that construction would be doing violence to the language, by substituting the amount of the "recovery"

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for the amount of the "claim." That such was not the intention of the makers of the statute, is manifest not only from the language itself, above quoted, but also from the subsequent provision in the same clause, that in a single class of actions, to wit: actions to recover the possession of personal property, there shall be a new trial on appeal, when the value of the property as assessed, and the damages recovered shall exceed fifty dollars. This change of phraseology cannot be regarded as accidental and unimportant, and is a very clear indication that the legislature intended the test to be in the one case the amount recovered, and in all others the amount claimed.

The defendant's counsel also urges as an objection to the ruling of the county court, that no witnesses testified either on the trial before the justice, or in the county court, that the amount of the damages exceeded fifty dollars. This view is also met by the consideration above presented. It would substitute for the amount of the claim the highest amount warranted by the testimony. Besides the jurisdiction of the appellate courts would thereby be made to depend upon no fixed standard or test, but upon the view which that court might take of the evidence below in respect to the amount of damages, and the statute provides no mode by which the parties could ascertain the views of the appellate court upon that question, before moving the cause for trial.

It is also objected that the ruling below makes the jurisdiction of the county court depend upon the amount claimed in the pleading, at the will of the party. But that feature is by no means peculiar to the statute in question. The jurisdiction of justice's courts in almost every form of action, depends upon the amount claimed (*Code*, § 53), and similar provisions in respect to other courts will readily occur to every lawyer.

The exception to the ruling of the county court, admitting certain testimony objected to by the defendant, is not

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well taken, as the testimony was responsive to the statement of the defendant's witness, that the thills in which the horse in question was driven, were of unsuitable length and size. It tended to show that the thills were of suitable length, and did not cause the vicious conduct of the horse complained of.

I think the judgment of the county court should be affirmed. Judgment affirmed.

SUPREME COURT.

EMILY J. HORTON agt. EDWIN B. PAYNE and GERTRUDE PAYNE, his wife.

In an action of *libel* against a *married woman*, her husband must be joined as a party defendant with her. And where process has been served on the wife only, she will be entitled to a *stay of proceedings* in the action until the husband has been served, or brought in as a party with her.

The statutes of 1862 do not relieve the husband from liability for the debts of the wife contracted before marriage, or for her *torts*, whether committed before marriage or during coverture; nor do they abrogate the common law rule or provision of the Code, which requires that the husband be joined with the wife in actions against her for such debts, or for her *torts*.

Broome Special Term, July, 1864.

MOTION by the defendant, Gertrude Payne, for an order staying all proceedings in the action against her, until her husband, Edwin B. Payne (who has not been served with the summons), is brought in as a defendant, so that the proceedings will bind him.

The action is brought to recover damages for a libel upon the plaintiff, which was written by Gertrude Payne, in the state of Connecticut, and by her sent by mail to a post master in Chenango county, in this state, where the plaintiff resides, and there published by such post master, at the request of said Gertrude.

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The libel charged the plaintiff, a teacher of youth, with lewd, wicked and vicious conduct.

Gertrude and her husband are residents of Connecticut. The former was served with the summons in this state, but the plaintiff has been unable to serve the summons upon the latter, who is at his residence in Connecticut.

Neither Gertrude nor her husband has any property in this state, and the plaintiff will never be able to serve the summons on the husband unless he should voluntarily come into this state, which it is not probable that he will do.

HENRY R. MYGATT, *for plaintiff.*

E. H. & H. G. PRINDLE, *for Gertrude Payne.*

BALCOM, J. Edwin B. Payne, and Gertrude, his wife, are jointly but not severally liable to the plaintiff for the damages she has sustained by reason of the libel that Gertrude wrote and caused to be published, of and concerning her. (*See 2 Kent's Com.* 149; 19 *Barb.* 321; 30 *id.* 506.)

By the Code, as well as the common law, the husband of Gertrude must be joined with her as a defendant in the action for the recovery of those damages. (*Code*, § 114; *Gra. Pr.* 2d ed. 93 and 127.)

As the law now is in this state, the husband is not a necessary party if the action has relation to, or concerns the sole or separate property of the wife. (*Code*, § 114; *Laws of 1862, chapter 172.*) It was provided by section 7, of chapter 172, of the laws of 1862 (*Laws of 1862, p. 345*), that "a married woman may be sued in any of the courts in this state; and whenever a judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate estate, in the same manner as if she were sole." And the following clause was added in that year to section 287 of the Code: "An execution may issue against a married woman, and it shall direct the levy and collection of the amount

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of the judgment against her from her separate property, and not otherwise" (*Laws of 1862, p. 850*).

These statutes make the separate property of a married woman solely liable to execution when the judgment is against her alone, and also liable to execution when the judgment is against her and another person, whether such other person be her husband or a stranger. They do not prohibit a joint execution against the property of all the persons against whom a judgment is recovered, when she is one of such persons, but authorize the seizure of her separate property for the satisfaction of such a judgment.

The statutes of 1862 do not relieve the husband from liability for debts of the wife contracted before marriage, or for her torts, whether committed before marriage or during coverture; nor do they abrogate the common law rule or provision of the Code, which requires that the husband be joined with the wife in actions against her for such debts, or for her torts.

The husband was relieved by the act of 1853 (*Laws of 1853, p. 1057*), from liability for debts of the wife contracted before marriage, so that the execution on any judgment for such a debt "shall issue against, and such judgment shall bind the separate estate and property of the wife only, and not that of the husband." But by an express provision in that act, an action for such a debt must still be brought against the husband and wife jointly (*Laws of 1853, p. 1057, § 1*).

The law now is as it always has been, that the husband is jointly liable with the wife for her torts, whether committed before or after marriage. (*See authorities supra; Goulding agt. Davidson, Am. Law Register, N. S. vol. 3, p. 34.*) But as has been seen, the rule has been changed respecting the satisfaction of judgments recovered for such torts, so that executions on such judgments may issue against the property of the wife as well as of the husband.

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(See old rule, 2 Kent's Com. 144 and 149; Gra. Pr. 2d ed. p. 127.)

If Mrs. Payne and her husband were severally liable for the libel in question, or if a separate judgment could be rendered against her in the action, then the plaintiff could proceed against her without serving the summons on her husband, under section 136 of the Code. But as she and her husband are neither jointly indebted, nor severally liable to the plaintiff, by reason of the libel, that section is not applicable to the case.

The bare fact that Edwin B. Payne has been named as a defendant in the summons and complaint, does not make him a party to the action. Simply calling a person a defendant in an action for a tort, does not constitute him one. This court held in *Robinson agt. Frost* (14 Barb. 536), where an action not founded on contract is brought against two persons, and process is served on only one, the one not served is no longer a party.

Edwin B. Payne cannot be regarded as a party to the action, though named as a defendant in the summons and complaint, until the summons is served on him, or he is brought in some other way, so he will be bound by the proceedings in the action, and I do not know of any way he can be brought in except by the service of the summons on him.

For these reasons I am of the opinion the plaintiff's proceedings in the action should be stayed until Mr. Payne, the husband of Gertrude, is brought in as a party defendant with her.

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NEW YORK COMMON PLEAS.

THOMAS W. WHITLEY, respondent agt. HENRY H. LEEDS
AND OTHERS, appellants.

Although an original process stamp may be necessary on a notice of appeal from a justice's court to the court of common pleas, yet notwithstanding section 95 of the act of congress, July 1, 1862, which provides that every instrument, document or paper, not stamped according to schedule B, should be invalid and of no effect, an appeal will not be absolutely void where such a stamp has not been preliminarily affixed to it, provided the court considers that the appeal was taken in good faith. In such a case, where it appears that the appellant had through mistake, omitted to do some act necessary to perfect the appeal, they will, under section 327 of the Code, allow the appellant to perfect his appeal by affixing the stamp on it even in open court.

General Term, July, 1864.

Before DALY, BRADY and CARDOZO, Judges.

THIS case came up on appeal from a judgment entered on a verdict of a jury in a cause tried in the eighth judicial district, before Hon. WM. H. BULL, Justice, in favor of the respondent. The facts of the case were these:

In April, 1863, the plaintiff, who is an artist, left with the defendants, an auction house in this city, to be sold at auction or private sale, an original painting, inclosed in a gilt frame, entitled "Stratford on the Avon," limiting the price at private sale for \$150, and at auction for \$100.

Shortly after the plaintiff applied to the defendants for a loan of \$15, which was given him by them, and he signed, as he supposed, a simple receipt for that amount, but the receipt on its face expressed that the \$15 was an advance on the painting, which was to be sold without reserve. Subsequently the picture and frame were sold by the defendants at auction for \$24, although it was proven that the frame alone was worth \$25.

A few days after the loan the plaintiff called on the

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defendants to inquire if his picture had been sold, and to his surprise learned it had been sold at auction for \$24.

They then offered him the balance, deducting the \$15, and expenses and commissions. The plaintiff refused to receive it—declared it was all wrong, that he had positively told the defendants not to sell for less than “\$100 at auction.” He was referred to one of the defendants, who in answer to his expostulations, produced and showed to him his receipt signed on obtaining the loan of \$15. This was, as the plaintiff testified, the first knowledge or information he had of the existence of any receipt expressing that the painting might be sold without reserve. The defendants justified their action by the receipt, claiming that the plaintiff had withdrawn the limit given to them on consigning the picture to them, and they were at liberty to sell it without regard to the limit put on it by the plaintiff. The defendants refusing to make any further payment than the balance of \$24, the plaintiff brought his action. The jury rendered a verdict for the plaintiff for \$85, on which judgment was entered.

T. M. SQUIRES, *for the appellant.*

D. McMAHON, *for the respondent.*

On the argument of the appeal, Mr. McMahon raised the point that the notice of appeal was not stamped in accordance with the act of congress. The counsel referred to section 95 of the act of congress of July 1, 1862, which provides that “every instrument, document or paper,” not stamped according to schedule B, was invalid and of no effect; also to the schedule D, which provides that the stamp of fifty cents should be affixed on every writ or other original process, by which any suit is commenced in any court of record, either law or equity.

The counsel contended that inasmuch as by the Code writs of error and certiorari in appeals are abolished, and

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the notice of appeal substituted therefor, it was to be considered as a "writ or other original process by which any suit is commenced in any court of record." In confirmation of this view, the counsel further referred to a decision made by the commissioner of internal revenue, which holds that an appeal or instrument by which a suit is transferred from a justice of the peace to a higher court is an original process, and subject to stamp duty as such.

The court, DALY, J., appeared to think that the appellant might fix a stamp on the process in open court, but after consultation the three judges coincided with the necessity of the stamp, and decided that where it appeared that an appeal was taken in good faith, and the appellant had emitted through mistake to do any other act necessary to perfect the appeal, the court might, under section 827 of the Code, permit the appellant to perfect his appeal, and they concluded to allow the appellant to affix the stamp at once, which was done in open court.

The case on appeal was then heard on the return and the merits, and judgment of affirmance was rendered in favor of the plaintiff.

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NEW YORK SUPERIOR COURT.

WILLIAM W. NILES, respondent agt. LUDLOW A. BATTERSHALL, impleaded, &c., appellants.

Although, under the Code, a plaintiff may recover against one defendant out of several, upon his several contract, notwithstanding the former has alleged it in his complaint to be joint, he cannot deprive a defendant, served with process, of the right of having his co-contractors joined with him, in order to have judgment entered against them all, to be enforced against their joint property under § 136 of the Code, *whether they are served with process or not.*

Particularly not, by first adding them as parties on the record to prevent an answer in *abatement*, and then dropping them in the judgment, without any leave of the court or notice to the defendant served.

Where a referee makes two reports, both of which contain an award of judgment, a *special report* containing findings of fact and conclusions of law, and the other a *general report*, finding the same sum to be due by reason of the matters and things contained in the complaint: *Held*, that the general report did not dispose of such issues as a report of referees is required by the Code to do, and must be disregarded.

New York General Term, February, 1864.

Before ROBERTSON, C. J., GARVIN and McCUNN, Justices.

APPEAL from a judgment entered on report of a referee.

A. R. DYETT, *for defendant Battershall, appellant.*

W. W. NILES, *for plaintiff, respondent in person.*

By the court, ROBERTSON, C. J. The referee to try the issues in this cause made two reports, one termed special, containing findings of fact and conclusions of law, and the other general, both of which contain an award of judgment in favor of the respondent against the appellant for a certain sum. The general report finds that sum to be due by reason of the matters and things contained in the complaint. The special issues of fact raised by the answer were, whether the services alleged by the respondent to be performed by him, were rendered for his own benefit or not,

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and whether the appellant employed him to render such services; all the other matters in the complaint were controverted. Such general report did not dispose of such issues as a report of referees is required by the Code to do (§ 272). What are issues, are defined by it (§ 250). And there was nothing in such general report by which to amend it (*Peck agt. Yorks*, 14 *Howard*, 416); it may therefore be disregarded as superfluous. Such special report gives as the referee's conclusions of law:

First—that the respondent was entitled to recover against the appellant a certain sum for the services mentioned in the finding of facts, which preceded in such report.

Second—That the respondent was entitled to judgment against the appellant for such sum, which last conclusion is repeated in the general report annexed. The judgment entered upon such report was against the appellant alone, as "impleaded," &c., for the same amount with costs, thus conceding that there were other parties to the record.

Such special report does not find explicitly that the appellant, either alone, or jointly with others, not parties to the record, employed the respondent to render the services set out in the complaint, but merely that the appellant and others of the officers and stockholders of a certain company, in their individual capacities, employed the respondent professionally to attend to sundry matters affecting the property of such company. It does not state the name of such others, or whether they were the other defendants or not, although the complaint alleges that all the defendants were officers and stockholders of such company. Although such report contains several items of evidence to show that the appellant was principally interested in having such services performed as the respondent rendered, there is no room to construe such report as a finding of a several contract made by the appellant alone.

If, however, such report is to be construed as deciding that the respondent was employed by the appellant alone,

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it is unsupported by evidence. The testimony of the respondent, of two defendants (Van Buren and Davis), and of the counsel (Wilson), and secretary (Phillips) of the company, shows a joint retainer by all the defendants, and there was no evidence of a separate retainer by the appellant alone. The only difference between such witnesses was as to the character in which the defendants retained the respondent. Indeed, the referee, in his opinion, admits there were co-contractors of the appellant. Although, under the Code, a plaintiff may recover against one defendant out of several, upon his several contract, notwithstanding the former has alleged it in his complaint to be joint, (*Clafflin* agt. *Butterly*, 5 *Duer*, 527; *Parker* agt. *Jackson*, 16 *Barb.* 33; *Bonneskill* agt. *James*, 1 *Kern.* 294; *Marquat* agt. *Marquat*, 2 *id.* 342;) he cannot deprive a defendant, served with process, of the right of having his co-contractors joined with him, in order to have judgment entered against them all, to be enforced against their joint property, under section 136 of the Code, whether they are served with process or not; and particularly not by first adding them as parties on the record, to prevent an answer in abatement, and then dropping them in the judgment, without any leave of the court, or notice to the defendant served.

It is much to be regretted that an omission or defect of apparently so slight a character, should prevent the respondent from reaping the benefit of a report in his favor for meritorious services, after a severe contest before the referee. If the referee had found a joint employment by the defendants as his report on the issue, the judgment might perhaps have been amended to correspond. But the judgment as actually given by him can only be sustained by the finding of a several contract, which the evidence does not support. The referee seems, by his subsequent certificate, to have supposed that he could give judgment against any one defendant served with process, wholly disregarding the others. In that he is mistaken. He takes the place of the

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court and jury, and is as much bound after trying the issues, to assess damages against the parties who have made default, or are not served, as those served, or who have pleaded, as he would have been under the former mode of practice, since the judgment to be rendered upon his report is finally to determine the rights of the parties in the action (§ 245 Code). I think it would have been better for all parties if the question of the value of the plaintiff's services had alone been referred, leaving the other questions to be determined by a jury, as was done by this court in *Bowman agt. Sheldon* (1 *Duer*, 607), under section 271, subdivision 2, of the Code. Questions of law may arise on the trial proper to be disposed of by the court. If the respondent chooses to modify the order of reference so as to confine it to a reference to determine the value of his services, leaving all other questions to be determined on a trial, it may remain thus modified, otherwise it must be vacated.

The judgment must at all events be reversed, and a new trial ordered, subject to such modification of the order of reference, with costs to abide the event.

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SUPREME COURT.

NEWEL W. CARTER, appellant agt. WILLIAM WERNER,
respondent.

An *appeal* to the supreme court, from a judgment of the county court, does not authorize the supreme court to reverse the judgment and grant a new trial upon *exceptions taken upon the trial in the county court*.

A *new trial must be moved for in the county court*, before an appeal can be taken on a case or bill of exceptions in that court to the supreme court. (*This seems to be adverse to Monroe agt. Monroe, ante, p. 208.*)

Syracuse General Term, April, 1864.

Before MORGAN, BACON and FOSTER, Justices.

APPEAL from the judgment of the county court, upon exceptions taken at the trial; the cause having been appealed from a justice's court, and a new trial ordered to be had in the county court, under § 352 of the Code, as amended in 1862.

H. SHUMWAY, *for appellant.*

C. D. ADAMS, *for respondent.*

By the court, MORGAN, J. I think the appeal to this court from the judgment of the county court, will not authorize us to reverse the judgment and grant a new trial upon exceptions taken upon the trial in that court. A new trial must be moved for in the county court, and if that court refuses it in a proper case, an appeal lies from the order to this court. We have no authority to grant a new trial in that court in the first instance, upon a bill of exceptions. Our jurisdiction is strictly appellate, and until the county court makes the order which is the subject of appeal, under the 344th section of the Code, we have no authority to interfere.

We had occasion to examine this question in *Gilbert agt. Chase*, and in *Palmer agt. Avery*, and we came to the con-

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clusion that the Code as amended in 1862 (§§ 352 and 366, sub. 5 and 6), devolved upon the county court the same power over its own determinations and the verdict of the jury, as was elsewhere conferred upon the supreme court in relation to trials at the circuit; and that the motion for a new trial in the county court in a case on exceptions, must be made there in the first instance.

Formerly the bill of exceptions was taken directly to this court with the writ of error (2 R. S. 423, § 78), but now by section 30 of the Code, authority is conferred upon the county court to grant new trials, or affirm or reverse judgments in actions tried in such court, upon exceptions or case made, "subject to an appeal to the supreme court;" this arrangement necessarily implies that the county courts must first act, and make some disposition of the exceptions, in order to give this court authority to review them. The ruling of the county judge, in the rejection or reception of evidence, is not an order within the meaning of section 344, from which an appeal lies to this court. Nor is it proper that the two courts should have concurrent jurisdiction over the "determinations" and "the verdict of the jury," in the county court, as would be the case if the exceptions could be heard here before they were finally disposed of by the order of the county court. As the county court may reverse its own judgments upon exceptions (§ 30 of the Code), "subject to an appeal to this court," it will not be desirable, even if we have the authority, to examine the exceptions upon an appeal from the judgment. While an appeal is pending in this court, the county court may entertain a motion to reverse the judgment appealed from, either upon "exceptions or case made." It will be time enough for us to interfere after the county court has made an order upon the "exceptions," which is the subject of appeal under the 344th section of the Code.

It follows that the plaintiff must first apply to the county

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court for a new trial upon his exceptions, and if that court refuses to grant it, an appeal may then be taken to this court.

Appeal dismissed.

SUPREME COURT.

ELISHA S. SHELDON, respondent, agt. BURDETT STRYKER,
SHERIFF OF KINGS COUNTY, appellant.

The *due execution* of an agreement or bill of sale, in order to be admitted in evidence on the trial, is shown, where the acknowledgment or proof is taken before a commissioner of deeds, accompanied by the certificate of the county clerk of his appointment and authority to act as such commissioner.

Where the commissioner states that the subscribing witness was known to him, it is a substantial compliance with the requirement of the law. It is not necessary that the *precise language of the statute* should be used; the officer cannot certify that he knows the party making the acknowledgment or proof before him, unless he is personally acquainted with him.

The objection to the certificate of the officer taking such proof or acknowledgment, must be made at the trial; it is unavailable to the party if made afterwards for the first time.

If an *assignment for the benefit of creditors* is fraudulent as against creditors, that will not affect the title of a purchaser of the assigned property, if he was not connected with the fraud, and was in fact a purchaser in good faith, and for a valuable consideration, without notice of the fraud.

The fact that the assignees immediately after the acceptance of the assignment, refused to take possession of the entire property, does not deprive them of their rights under the assignment, or relieve them from their obligations under it.

Where there is sufficient evidence to sustain the finding of the jury, the court will not grant a new trial on the ground that the verdict was *against evidence*, because the testimony of one witness tended strongly to establish a different result.

The court will not grant a new trial on the ground of *newly discovered evidence*, where such evidence relates to the most important matters controverted on the trial, and upon which the jury under the charge of the court had rendered their verdict. Such evidence is cumulative merely, and is not a ground for a new trial.

Motions for new trials on the ground of newly discovered evidence will not be granted where the evidence is *cumulative* in its nature, or where a party has been guilty of *laches* in making it, or where the *judgment has been entered*.

Kings General Term, March, 1864.



Sheldon agt. Stryker.

Before BROWN, LOTT and SCRUGHAM, Justices.

THIS was an action against the late sheriff of Kings county to recover the value of a stock of goods in the store No. 166 Grand street, Brooklyn, E. D., which was levied upon and sold by the defendant, under and by virtue of an execution against the property of William S. Irvine & Co., in favor of Ide, Felt & Hall.

A general assignment, with preferences, was made and executed by Wm. S. Irvine & Co., on the 3d day of July, 1857, and on the 27th of that month the assignees sold the goods in question to the plaintiff. On the 9th day of the same month and year, "Ide, Felt & Hall" entered up judgment by confession, upon a statement for judgment made nearly six months previously, and issued the said execution thereon. The cause was tried twice, and the plaintiff had judgment perfected in his favor for \$2,205.33.

The defendant appealed to the general term from this judgment, and also from an order made at special term denying a motion for a new trial, based upon newly discovered evidence. The motion for a new trial was made subsequently to the entry of judgment.

MR. CAMPBELL and F. C. BLISS, *for plaintiff and respondent.*

CHESTERS & KENNEDAY, and JOHN DIKEMAN, *for defendant and appellant.*

By the court, LOTT, J. The assignment, bill of sale and agreement, were properly admitted in evidence, on the acknowledgment and proof thereof before a commissioner of deeds, accompanied by the certificate of the county clerk of his appointment and authority to act as such commissioner. Every written instrument except promissory notes and bills of exchange, and except the wills of deceased persons, so acknowledged or proved, with the proper certificate of the fact indorsed thereon, may be received in

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evidence on the trial of any action, with the same effect, and in the same manner, as if such instrument were conveyance of real estate (*Laws of 1863, chap. 271, § 9*). The certificates were all sufficient and in proper form. That indorsed on the bill of sale and agreement, contained a sufficient statement that the commissioner, was personally acquainted with the subscribing witness. He says that such witness was known to him. That is a substantial compliance with the requirement of the law. It is not necessary that the precise language of the statute should be used, and the officer cannot properly certify that he knows the party making an acknowledgment or proof before him, unless he is personally acquainted with him. But if the certificate in that respect is defective, that objection is not available now. It was not taken on the trial. If it had been it might have been obviated by the production of the subscribing witness himself, or by other competent proof. It is true that the defendant urged as one of the grounds of his objections to the reception of those documents, that its execution should be proven by a subscribing witness, or that its non-production should be accounted for, but that related to the nature and character of the proof itself, and not to any form or defects in the certificate of such proof.

That ground was clearly untenable, nor was it necessary that the acknowledgment or proof should be taken before the commencement of the action. All that is required is, that the requisite certificate of the fact shall be indorsed on the document. The production of the witness was, therefore, not necessary.

The objection taken to the agreement, on the ground "that it was a collateral agreement," was without foundation. It was, in fact, a part of the terms of the bill of sale. Nor were any of the other grounds of objection well taken. They principally related to the order of proof merely, and not to the competency of the evidence. Those

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in reference to the delivery and acceptance of the papers were answered by their production and the acts of the parties under them, and the residue were sufficiently obviated by evidence during the progress of the trial. The exceptions taken to the judge's charge and his refusal to charge as requested by the defendant's counsel remain to be noticed. If the assignment was fraudulent as against creditors, that could not affect the title of the plaintiff, if he was not connected with the fraud, and was in fact a purchaser in good faith, and for a valuable consideration and without notice of the fraud. Nor could the fact, that the assignees immediately after the acceptance of the assignment refused to take possession of the entire property, deprive them of their rights under it, or relieve them from their obligations under it. These views show that the requests to charge were improper, and that the charge as made in reference to them was correct. The judgment, therefore, cannot be reversed on the ground of any of the exceptions presented in the case.

It then becomes necessary to consider whether the motion for a new trial should have been granted either on the ground that the verdict was against evidence or on the ground of newly-discovered evidence.

The judge in his charge submitted the question as to the time of the delivery of the execution and attachments and the levy under the same to the jury for their determination, and they have found adversely to the defendant.

There was sufficient evidence to sustain that finding. It is true that the testimony of one of the witnesses tended strongly to establish a different result, but facts and circumstances stated by him, and the other testimony in the case, which to a certain extent was in conflict with his evidence, warranted the conclusion that the plaintiff's title was acquired before any levy was in fact made and sustained the verdict rendered by the jury. There is, therefore, no ground for setting it aside as against evidence, nor

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is the defendant entitled to a new trial on the ground of newly-discovered evidence.

The evidence of which he seeks to avail himself is cumulative merely. It relates to the most important matters controverted on the trial, and upon which the jury, under the charge of the court, had rendered their verdict. Such evidence is not a ground for a new trial, but if it was, there is another objection to the application which is fatal. It appears, by the case and affidavit, that the cause was tried on the 13th day of April, 1863; that judgment was rendered on the 8th of May following; that the defendant, on the 5th day of June last, appealed from that judgment, and that the notice of the motion was not given till the next month. The application is too late. It cannot be made after judgment entered. This was held by us in the case of *Peck agt. Hiller*, 30 *Barbour, S. C. R.*, p. 656. There the rules and principles applicable to motions of this kind were considered, and it was decided that they will not be granted where the evidence is cumulative in its nature, or where a party has been guilty of laches in making it, or where judgment has been entered. Under that decision the motion in the present case was properly denied. The result of these views is, that the judgment and the order denying the motion for a new trial must both be affirmed, with costs.

NEW YORK SUPERIOR COURT.

JAMES BENKARD AND BENJAMIN H. HUTTON, appellants agt.
CHARLES H. P. BABCOCK, and others, respondents.

An *appeal* by the plaintiffs from a judgment, in their favor, is not *wasted* by their acceptance from the defendants of the amount of the verdict in favor of the plaintiffs, with costs.

The plaintiffs are obliged to enter up a judgment in order to bring an appeal. That judgment becomes a debt of record, having the like incidents as other debts,

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including its *bearing interest*. It does not merge the original claim, unless the litigation ceases there, by the appeal being unsuccessful. A *tender and refusal* is as effectual as a payment and receipt of moneys to stop interest. There is no principle by which a party is to be absolutely barred from litigating his claim for a larger sum than that paid, merely because he accepts part in order to prevent a loss of interest, if he turns out to be wrong.

In an action by the plaintiffs for the rent of a building, and a *claim* by the defendants for injuries arising from the entrance of water into the sub-cellar, founded on a covenant of guaranty by the plaintiffs against such injuries, is made in the answer by way of *set-off*, and a prayer is also contained therein for judgment for the excess of their damages beyond the rent claimed by the plaintiffs; the claim of the plaintiffs is substantially admitted, and the rights of the defendants to damages for breach of such covenant, as well as the pleadings and evidence in relation thereto, are to be governed by the same rules as if they were plaintiffs in an action on such covenant.

The judge at the trial properly instructed the jury that the defendants could not claim for any injury resulting from dampness not caused by percolation of water into the sub-cellar—the injury covenanted against. Any necessary natural dampness, incident to the location of the sub-cellar, or its construction, and not affected at all by water getting through the walls or floor of the sub-cellar, was a consequence which the defendants themselves must bear.

As a general rule, *opinions* of witnesses as to *damages* sustained by one person from the conduct of another, or occurrences for which he is responsible, are *inadmissible*, although stated with the facts on which they are founded, even when such facts are proved by other witnesses to have attended the occurrence complained of. *Opinions* of the value of articles may be given by those familiar with the identical articles, or similar ones. But whenever the value of the subject to be estimated is uncertain and varying, the witness can only give the elements of value as facts, and leave the jury to make their own estimates.

The questions put to the witnesses, or some of them, in this case, as to the deterioration in value of the premises, were inadmissible upon several grounds: 1. The evidence did not establish that the dampness referred to arose from the evil covenanted against.

2. The failure to establish that the witnesses, whose opinions were sought, were experts in the effect of dampness in cellars upon the rent of stores.
3. If such questions were intended to elicit the opinions of witnesses as to the value of the probable extent of injury to the goods and business of the defendants, it was substituting the witnesses in place of the jurors, who alone are the judges of the facts.
4. If such questions were intended to elicit the opinions of witnesses as to a loss in the market value of the store, they were premature, until it was shown that dampness in cellars depreciated such value; and if it had been shown, the defendants could not lose what by the terms of the lease they had no right to gain.

New York General Term, February, 1864.

Before ROBERTSON, C. J., GARVIN and McCUNN, Justices.

APPEAL by the plaintiffs from a judgment entered in favor of the defendants.

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WM. CURTIS NOYES, *for plaintiffs and appellants.*A. F. SMITH, *for defendants and respondents.*

By the court, ROBERTSON, C. J. It is claimed by the defendants, that the plaintiffs have waived their appeal in this case, by accepting from them the amount of the verdict in favor of the latter, with costs. Numerous authorities have been cited to us on the argument to sustain that position; but they will all be found to be cases where an appellant had attempted actively to enforce either the whole of a judgment, order or decree in his favor, or else some part thereof, connected with and dependent upon such other part thereof, as he may have appealed from; or else where he had availed himself of some benefit or favor granted or offered to him by such judgment, order or decree, as an alternative to exercising the right of appeal. Thus, in one of the most recent of such cases (*Bennet agt. Van Syckel*, 18 N. Y. 481), a defendant had appealed from all parts of a judgment except such as ordered the plaintiff to execute a bond of indemnity to him against the covenants in a lease, which he was therein directed to assign to the plaintiff, and also to pay certain moneys into court, to have the right thereto contested; notwithstanding which, he sued upon such bond of indemnity when delivered to him, and proceeded to litigate his right to such moneys, and it was held that the connection of all parts of such judgment with, and mutual dependence upon each other, precluded the defendant from availing himself of such part of the judgment as was in his favor, and appealing from that which was prejudicial to him. In *Vail agt. Remsen* (7 Paige, 206), the more general principle was sanctioned, that proceeding upon an order appealed from by an appellant, was a waiver of his appeal. In *Radway agt. Graham* (4 Abb. Pr. 468), and *Lewis agt. Irving* (15 Abb. 140, n.), acceptance of a benefit granted by an order, in the shape of costs to an appellant, as a condition of a favor

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granted thereby to his adversary, was held to be a waiver of an appeal from the part of the order granting such last favor. In *Noble agt. Prescott* (4 E. D. Smith, 139), the mere renewal of a motion, according to a privilege to do so, granted in an order denying such motion, was held to be a waiver of an appeal from the part of the order so denying it. The decisions in all these cases are traceable to the same principle as that laid down in *Bennet agt. Van Syckel* (*ubi sup.*), which is the injustice of enforcing or claiming that, the only right to which is derived from the adjudication of a court, and repudiating that which is made the consideration therefor, by the same adjudication as an entirety.

The principle applied in those cases, therefore, does not conflict with that sustained in *Higbie agt. Westlake* (14 N. Y. R. 281), and *Clowes agt. Dickinson* (8 Cow. 328), which were decided in the court of last resort. That justified an appellant in receiving money voluntarily paid to him, although adjudged to be due to him by a judgment, order or decree, from which he had appealed, simply to gain a decree for more. Whatever might be the result of the appeal, he could not be compelled to restore moneys so voluntarily paid. It was only available as an extinguishment of his claim, or part of it, in any subsequent litigation, and formed no basis for an order of restitution. A tender and payment of money into court, admits the cause of action, and gives to the party to whom it is tendered an absolute right to such sum for the same reason. The payment of a sum of money on account of a claim, even after judgment, does the same thing. The existence of a judgment is immaterial, and the pendency of the appeal only has the effect of rendering it contingent and precarious. The tender of the amount stops interest on the whole claim, if the appellant never recovers any more. A party refusing a tender loses both interest and costs, if he afterwards seeks to enforce his claim by action, simply because

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the law discourages unnecessary litigation. After an action is begun, an appeal to correct judicial errors is a right, only regulated, but neither favored nor disfavored by the law. A right of tender, therefore, intended merely to prevent interest and costs, should not be abused to compel the opposite party either to abandon an appeal or waive all claim to interest. Both parties deal together, subject to the result of the appeal, on which, besides the question of amount, the running of interest, as well as future costs are to depend, whatever may be such result.

The plaintiffs are obliged to enter up a judgment in order to bring an appeal. That judgment becomes a debt of record, having the like incidents as other debts, including its bearing interest. It does not merge the original claim, unless the litigation ceases there, by the appeal being unsuccessful. A tender and refusal is as effectual as a payment and receipt of moneys to stop interest. There is no principle by which a party is to be absolutely barred from litigating his claim for a larger sum than that paid, merely because he accepts part in order to prevent a loss of interest, if he turns out to be wrong. A tender accompanied by a demand of the acceptance of the sum in full discharge of all claims, or any other condition, is bad (*Wood agt. Hitchcock*, 20 *Wend.* 47), and therefore he cannot be compelled to accept it. The actual acceptance of the sum tendered, therefore, only extinguishes a claim where it is all to which the claimant is entitled. What the plaintiffs are entitled to in this case, depends on the result of their appeal. I do not know that if the tender had been refused, the defendants would have been bound to make it good, by forthwith bringing it into court, or if they did so, I apprehend the court would not make a waiver of the appeal a condition of taking it out, whatever other conditions they might impose.

The motion to dismiss the appeal, should, for the reason before given, be denied with costs.

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In order to determine the merits of the case before us, it will not be necessary to notice those covenants in the lease in question, for whose breach no damages were proved or claimed, or the parts of the pleadings which relate thereto, except so far as the admission of evidence, or any effect of such covenants, if any, or that for whose breach damages were recovered, or their influence on the question of those damages may require. Such lease contained no covenant for general repairs on the premises, by either lessors or lessees. The defendants covenanted to do only such repairs as might be rendered necessary by their use and occupation of the premises, besides agreeing to surrender the premises in as good state as reasonable use and wear would permit, damages by the elements excepted. Permission, however, was reserved therein to the plaintiffs, their servant or agent, at all times during the term, to enter into and inspect the demised premises, and "make such repairs therein as they shall deem proper." The premises were described in such lease as a five story, marble front store, and were thereby demised "for the purpose of the dry goods business." The defendants covenanted not to use or occupy them, or permit them to be occupied, or underlet them for any other business, and not to assign such lease, or the term granted thereby, without the consent of the plaintiffs. The covenant for whose breach damages were deducted from the claim of the plaintiffs, was not an undertaking by them to do, or forbear to do anything, but simply a guaranty against the occurrence of a particular event, not under their control, to wit: the percolation of water through the walls or floor of the sub-cellar of such building.

What difference it might have made in the practical result of the action, or the admissibility of evidence, or rule of damages, if the defendants had sought to recoup for injury sustained by them by ingress of water into the building in question, instead of setting off their damages,

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it is not necessary to discuss. Damages for breach of a continuing covenant of guaranty against a particular occurrence affecting lands (*Mayor, &c. of New York* agt. *Mabie*, 13 *N. Y. R.* 151), or even of a covenant to do a particular act, such as repairing (*Nichols* agt. *Dusenbury*, 2 *N. Y. R.* 283), may be recouped, but in the latter case the defendant is limited to the expense of doing such act, and cannot recover special damages (*Dorwin* agt. *Potter*, 5 *Denio*, 306), which are not the subject of recoupment (*Allaire Iron Works* agt. *Guion*, 10 *Barb.* 55). How far injuries, arising from the ingress of water into a building, although continuing for more than three months, could be subdivided so as to have the damages arising therefrom during each quarter, deducted from the rent therefor, by way of recoupment, is at least doubtful. Claims arising out of one contract cannot be applied in reduction of those growing out of another distinct one, although contained in the same instrument, or forming part of one transaction. (*Seymour* agt. *Davis*, 2 *Sand.* 239; *Denning* agt. *Kemp*, 4 *id.* 247.) Whether a covenant to pay rent in quarterly payments, does not or does make the payment of each year's or quarter's rent a separate contract, so as to enable the lessee to deduct damages for injuries during each quarter or year, arising from a breach of a continuing covenant, is perhaps immaterial in this case. The claim by the defendants for injuries arising from the entrance of water into the sub-cellar in question, is made in the answer by way of set off, and a prayer is also contained therein for judgment for the excess of their damages beyond rent claimed by the plaintiffs. The claim of the plaintiffs is substantially admitted, and the rights of the defendants to damages for breach of such covenant, as well as the pleadings and evidence in relation thereto, are to be governed by the same rules as if they were plaintiffs in an action on such covenant, and I shall proceed to consider their rights in the same manner as if they stood in that position.

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The language of the covenant, on which damages were recovered by the defendants, is somewhat peculiar. It is not that water should not percolate through the walls and floor of such sub-cellar in question, but that such sub-cellar should be "free from (such) percolation of water." It seems therefore not to have been intended that as many causes of action should arise as acts of percolation should occur, but rather one for the subjection of the premises to such ingress of water during the term. The answer also adopts this view, by negating the freedom of such sub-cellar from such invasion, and averring that "during all or the greater part" of the time until then, water had percolated through its walls and floor, and rendered the same wet and damp, and unfit for use. It also alleges, as an injury arising from "such wetness, dampness and presence of water in such cellar," deprivation of its use for the purposes for which it was let to the defendants, and also for the stowing of dry goods therein, and avers the difference in value of such premises, as covenanted to be in such lease, for the business for which they were let, and their value by the condition of such cellar, to be a certain sum per annum, which the defendants claim up to a certain date, and onward to the time of the trial, as damages. This certainly is not a claim for damages for each single act of percolation during each quarter, and its consequences, to be set off against the rent due at the end of that quarter; but is a claim for general damages, for injury to the defendants during all the time previous to the trial, caused by one continuous occurrence, consisting of successive acts violative of such covenant (*Shaffer agt. Lee*, 8 Barb. 412).

No requests to charge were made, and no exceptions taken to the charge as made, except as to the effect of certain letters. How the jury arrived at the amount of damages allowed the defendants, does not legally appear on the record. The amount would seem by calculation to correspond with the amount claimed in the answer, of annual

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damages by reason of the occurrences complained of, if allowed during the time water came into the cellar, from June, 1861, as the date of its first appearance there, to its final exclusion, by appliances introduced by the plaintiffs. But another claim for damages, from a similar cause, during a prior period, was submitted to them by the learned judge before whom the cause was tried, to wit: from the time of the defendants entering into possession, until the November following, but without any evidence in the case, that I have been able to find, to sustain such a claim. There was evidence to prove that such sub-cellar had been damp during the period last mentioned, and that such dampness might have arisen from moisture in the materials of which it had been recently built, there was none to prove it arose from any percolation of water in the cellar. The learned judge properly instructed the jury that the defendants could not claim for "any injury resulting from dampness not caused by percolation of water into the sub-cellar. Any necessary natural dampness, incident to the location of the sub-cellar, or its construction, and not affected at all by water getting through the walls or floor of the sub-cellar, is a consequence which the defendants themselves must bear." The testimony of one of the defendants (Babcock), was, that he first observed water in the cellar in 1860, without stating where it was, or how it got there, or even fixing the date, except prior to August, 1860. He also stated the cellar generally to be damp, at some indefinite time, yet admitted it to be fit for storage for the period between December, 1860, and June, 1861, although not at other times, "by reason of the dampness, liability of the water to percolate through the floor," as to which he furnished no evidence. Another defendant (Milnor), testified to having noticed, without fixing the date, a general dampness throughout the whole store, as well as to the unfitness of the store for the storage of dry goods, from May, 1860, to December, 1862. A porter of the defendants' (Fitzpatrick), testified that he

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thought he noticed water around the elevator in June, 1860; that the state of the cellar from May to December, 1860, was "damp a little; part of the floor was damp, and part dry." He also expressed an opinion as to the fitness of the cellar for storing dry goods, from May, 1860, to December, 1862. Another porter (Armstrong), thought the cellar "very damp and wet;" this was some time before the early part of 1861. The father-in-law of one of the defendants (Franklin), who occupied part of the basement, testified, "there was dampness round the columns in August, 1860, and the autumn of that year, and that since that time the basement had been so damp he could not stay over an hour there;" also, that after June, 1860, "there was more or less dampness in the sub-cellar all the time." On the other hand, the defendant Milnor admitted on his examination that they "deemed the cellar safe for the storage of dry goods, from the autumn of 1860, to the spring of 1861;" that he thought it "very likely a statement was made to one of the plaintiffs that the place was dry, and there was no water," because at the time "they stored goods there, they considered the basement or sub-cellar reasonably dry." He also stated that the basement would be "naturally a little damper" than the sub-cellar, and that moisture from the atmosphere would not injure woolen or domestic cotton goods. The agent of the builders of the cellar (Vaughan), constantly examined the cellar, and asked about it of one of the defendants between August, 1860, and April, 1861, but he neither saw nor heard anything of its dampness. He, among others, testified as to the natural dampness of a cellar, and that it would take six months to dry it. None of the witnesses preserve the distinction very accurately, between the dampness of the air of the basement and the cellar, and moisture of the floor, walls, or other solid substances. Stoves and steam apparatus seem to have been employed from time to time, to correct the former, and perhaps the latter. The principal, if not only subject of

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complaint, from May to December, 1860, was dampness of the atmosphere in the basement and cellar, without the slightest evidence showing that it originated in the oozing of water through the floor or walls. And I am not prepared to consider it as a matter of judicial cognizance, that dampness in a room must arise from the percolation of water through its walls or floor, particularly as all the direct evidence in the case shows it was the inevitable attendant of a newly built cellar. The question of due proof of injury arising from the evil covenanted against, during the period between May and December, 1860, of course is immaterial in reference to its having been submitted as a question of fact to the jury, because there are no exceptions to the charge; but it is important in reference to questions which were excepted to, put to witnesses as to their opinions in regard to deterioration in value of the premises, arising from that cause, during all the time from May, 1860, to December, 1862. Thus the defendant Babcock was allowed to state the state of the sub-cellar, in respect to the storage of dry goods during all that time. Another defendant (Milnor), was allowed to state what, in his judgment, the premises in question were worth less per annum during that time, "in consequence of the state of that cellar;" such state being as he observed it, merely "general dampness through the whole store sometimes, and great dampness in the basement." This certainly was not necessarily injury arising from the entrance of water. Both those questions were clearly improper, until a proper foundation had been laid, by showing that the covenant in question had been violated during all that time.

Another set of questions, of a similar character, was put to other witnesses, in reference to their opinion of the effect upon the yearly value of such store, of a certain degree of dampness in the sub-cellar and basement, producing mould upon books, papers and articles of furniture therein, as well as injury to dry goods. As a necessary foundation

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for such questions, it should have been preliminarily shown, when such dampness existed, as well that it was caused by the percolation of water through the floor or walls of the sub-cellar; because, even if such water entered first through the basement, that formed no cause of action under the covenant in question. Setting aside the evidence already alluded to, of dampness in the basement and cellar, prior to December, 1860, there was no evidence of any ingress of water through the floor of the sub-cellar until about the time of the notice thereof given for the first time by the defendants to the plaintiffs, in June, 1861. Mr. Franklin, the occupant of the basement, testified, that "after June, 1860, there was more or less dampness in the sub-cellar all the time. * * The basement has been very damp—always damp—so much so that I could not stay there any time since August, 1860. I observed a green mould on my desk, chair cushion and books; some of my papers were entirely damp, so that they were almost illegible." He also testified, that his papers in tin boxes, placed in a wooden box within an iron safe, "have been saturated, and are still." He saw the green mould in the autumn of 1860—say in September—he could not state the day. One of the porters (Armstrong), stated that, in his opinion, the cellar never was fit for dry goods, because, after opening cases to take out samples, and leaving them open, in two days they would see a "kind of fur" covering the papers, being the mould before spoken of by him. He also testified, without specifying any time, that "Mr. Franklin's desk and books were in such a state, * * because it was so damp we could not brush it off. There was a kind of mould, at different times, upon the chairs," and that paste-board covers of goods were wet through. One of the defendants (Babcock), stated in his testimony: "There are in the basement books, a desk, chairs and other things, which are mildewed, covered with green mould," without stating when or from what cause it came there. Another

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(Milnor) says: "He had seen mould on Franklin's desk," and had seen goods damp, but with the same indefiniteness as to time. A Mr. Tuttle, another witness, saw the mould on the desk, on some occasion when he was there, during six or eight visits to the sub-cellar, but without giving their dates, except they were during 1861 and 1862, and prior to December, 1862; and he observed water in the cellar every time. Assuming that such mould and dampening of the covers of goods were seen by the witnesses after June, 1861, when the water percolated through the floor, there was no evidence offered to show that it must have originated from moisture produced by the evaporation of such water, and not from that incident to a cellar damp from other causes. It was in evidence that other causes did produce such moisture, and that it produced the mould and dampened the goods, for even Mr. Franklin saw that in September, 1860, before any water entered, and it was left to conjecture to determine that it arose afterwards from the water which had oozed in. It is true, the coincidence in time of the presence of the water, the damp air and the mould might possibly have been thereby established, but neither the court nor jury would have a right to conjecture therefrom that they were inevitably connected with each other. Several witnesses (Lloyd, Patterson and Tuttle), however, were allowed to state their opinion of the effect upon the value of the store, basement and sub-cellar, merely of such moisture; in the latter as to cause dampness in the basement, mould on cases of goods, and on Franklin's furniture, books and papers, and cartons of goods, without regard to or proof of the origin of such moisture. Such testimony being immaterial by itself, could only have an effect to produce an undue bias on the minds of the jury. The exceptions thereto were, therefore, improperly overruled. Still more objectionable questions were put to two other witnesses (Townsend and Tuttle), who had only made a few visits to the premises, whose

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varying condition they observed and described, and were asked to state how much less, in their opinion, for the dry goods business, such store, basement and sub-cellar were worth yearly in consequence of such condition? That assumed, without evidence, that such condition continued at least for a year. Tuttle, especially, was asked about the effect of dampness in the basement, although he had never noticed it, and only saw mould as its effect; while the water found by Townsend was more or less; "sometimes but little, at other times an inch or an inch and a half in depth." So that the former was made to testify as to the effect of a cause of which he knew nothing, and the latter to the permanent effects of fluctuating causes. Those questions should have been excluded when objected to.

Two witnesses (Milnor and Tuttle), were allowed to testify as experts, after objection, as to the effect of the state of the cellar upon the value of the premises in question, when their only stock and extent of experience consisted of having hired stores, and being acquainted with their value. They do not appear to have been acquainted with the effect on a yearly rent, of dampness in a basement, or water in a sub-cellar. A mere knowledge of the value of stores which never had a damp basement, would not assist any one in determining the extent of its deteriorating effects on such value. A singular question was allowed to be put to a medical practitioner, whether a certain state of dampness in a cellar, producing certain effects, would not be injurious to the health of an occupant of the store to which such cellar belonged. There was no evidence in the case that the health of any of the defendants had been injured by the violation of the covenant complained of, or they had lost the services of any clerk thereby, or an opportunity of renting the store, or that the danger to an occupant's health was one of the influences which would cause a depreciation in the value of a store, in consequence of having a wet cellar. Possibly the court may have allowed

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the question first as a matter of discretion, on the supposition that such facts would be proved, and their attention was not called to it so as to warn the jury against being influenced by it. Still it was a dangerous exercise of that discretion, as it had a natural tendency to influence their minds, and, being matter of opinion only, should have had the facts which justified its admission first proved. It was at all events defective in assuming the dampness to have been proved to have originated not in the sweating of a new cellar, or other causes, but in the percolation of water.

Another objection, to which every question put to the witnesses on the trial, in relation to the difference of yearly value of the premises, by reason of the dampness is, that they either assume, without proof, that such dampness affected such yearly value in the market, or do not discriminate between such reduction and yearly damages, caused by the dampness, to be set off against the rent. In other words, they do not distinguish between such yearly diminution as an element or item of damage, and as a standard of damages. The jury might have taken the amounts given as the sole measure of damages, throwing out of view all evidence of position, physical injury, either to goods or otherwise, or have taken it as another element of damage, to be added to that last referred to. No preparation was made for receiving it legally as a measure of damages, by ascertaining preliminarily whether dampness usually diminished the value of a store by fixed rates, and that the witnesses knew it. It was clearly not a separate element of damage, if, besides the probable injury to goods and loss of business embraced in it, the defendants were to be compensated for actual injury. The answers of the witnesses show how they understood such questions; they evidently speculated on the probable amount of injury to the business and the goods, and fastened the loss on the rent, without undertaking to say that such considerations would or did influence persons about to hire stores for the dry goods:

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business. As a general rule, opinions of witnesses as to damages sustained by one person from the conduct of another, or occurrences for which he is responsible, are inadmissible, (*Fish* agt. *Dodge*, 4 *Den.* 311; *Morehouse* agt. *Matthews*, 2 *N. Y.* 514; *Duff* agt. *Lyon*, 1 *E. D. Smith*, 536; *Dunham* agt. *Simmons*, 3 *Hill*, 609), although stated with the facts on which they are founded (*Cook* agt. *Brockway*, 21 *Barb.* 331; *Lincoln* agt. *Saratoga and Schenectady R. R. Co.* 23 *Wend.* 425; *Harger* agt. *Edmonds*, 4 *Barb.* 256), even when such facts are proved by other witnesses to have attended the occurrence complained of (*Paige* agt. *Hazard*, 5 *Hill*, 603). Opinions of the value of articles may be given by those familiar with the identical article, or similar ones (*Clark* agt. *Baird*, 9 *N. Y.* 183). But whenever the value of the subject to be estimated is uncertain and varying, the witness can only give the elements of value as facts, and leave the jury to make their own estimates. (*Dunlap* agt. *Snyder*, 17 *Barb.* 561; *Maxwell* agt. *Palmerston*, 21 *Wend.* 407.) Probable damage to the business or merchandise of a merchant, by the effects of vapor from a cellar, during any fixed time, could not well be measured by any proportion of the rent. It is not probable that any one would hire a store, at a rent whose low amount would compensate him for damages to his goods, or injury to his business. The only way in which such defect would probably operate on landlords and tenants, would be by the store commanding tenants, such as would not require the use of the parts affected by dampness, or whose business did not suffer from it, and who could not afford to pay the higher rent of a sound store. At all events, no evidence in this case discloses in what way such probable damage affects such yearly value. No question was put to a single witness as to whether the dampness of a cellar affected the yearly value of a store, measurably to any extent, capable of being stated in money value. Dampness clearly did not affect the rent directly, nor through the medium of

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actual injury to business or goods, and if it did it in any other way, it must be shown to have done it in that way, and that the witness knew it, before they can be allowed to give their views of its extent. How the answers of the witnesses showed the consequences of putting the question in the mode adopted, of assuming that dampness did affect yearly value, and simply calling upon them to state the amount and the basis of an estimate, may be seen in the testimony of one witness (Townsend). He took, as the basis of his estimate of the depreciation of rent, the loss of a place for samples, the annoyance of procuring another, and injury to goods, which presupposes the occupation of the store, and actual injury, irrespective of diminution in the market value. As those injuries would depend on fluctuating causes, the jury were the sole proper judges of their extent, when the facts were given. There was also another serious objection to giving evidence of a deterioration in the market value of the stores by the dampness of the cellar, which was, that the defendants could not assign their interest in the premises without the consent of the plaintiffs, and it was not, therefore, a vendible commodity; their sole value to the defendants was their right of occupying them. The law might transfer them to another—the parties could not. The questions put to witnesses, therefore, as to deterioration in value of the premises, or some of them, were inadmissible on some one or more of the grounds already stated, to wit:

1. The evidence did not establish that the dampness referred to arose from the evil covenanted against.

2. The failure to establish that the witnesses, whose opinion was sought, were experts in the effect of dampness in cellars upon the rents of stores.

3. If such questions were intended to elicit the opinions of witnesses as to the value of the probable extent of injury to the goods and business of the defendants, it was substituting the witnesses in place of the jurors, who alone are judges of the facts.

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4. If such questions were intended to elicit the opinion of witnesses as to a loss in the market value of the store, they were premature, until it was shown that dampness in cellars depreciated such value; and if it had been shown, the defendants could not lose what by the terms of the lease, they had no right to gain.

For which reasons, as the exceptions to such questions were well taken, it renders any consideration of other topics almost unnecessary. The defendants, for their own sakes, would have been obliged to do something to prevent the effects of the water. They could not legally have allowed it either to remain or re-enter, so as to produce all the harm it could, in order to recover all the damages they could therefor from the plaintiffs. The contract is one of indemnity merely; in fact, closely resembling that of insurance, particularly as it is against one of the elements. The plaintiffs are, therefore, entitled to compensation for actual loss alone, for the expense of repairing past and preventing future evils, besides deprivation of temporary use of the building, or permanent deterioration of it. The acts done by the plaintiffs may not have been strictly repairs; their entry, however, was under the defendants' license, until May, 1862. No physical obstruction was ever placed in the way of their proceedings, and they completed the work of excluding the water from the cellar. The notices given in May and July, of that year, of course did not disentitle the defendants to compensation for damages, which were the natural and necessary result of the percolation of water, and either not caused by their own delay in preventing repairs, or caused by the improper delay of the plaintiffs, who undertook to make them; but they had no other effect. What might have been the rights of the parties, if the plaintiffs had retired pursuant to such notices, it is not necessary to decide.

The judgment, therefore, should be reversed, and a new trial granted, with costs to abide the event.

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SUPREME COURT.

HENRY C. ADAMS agt. PETER G. FOX, Executor, &c., impleaded with LAWRENCE M. FOX.

An attorney has a lien on a judgment recovered by him for his services in the prosecution or defense of the suit in which such judgment was recovered. Before the Code, the taxable costs in a cause were the measure of compensation between attorney and client.

Since the Code, the taxable costs are no longer the measure of compensation, the lien of the attorney is for the measure of compensation the parties may legally agree upon—either a fixed sum, or a part of the judgment when recovered, or so much as his services may be worth.

Where the plaintiff, an attorney, brought an action against his client and the judgment debtor of the latter—such judgment debtor being an executor, and asked to have established by the court an equitable assignment of the judgment to himself from his client, to the amount that should be adjudged due from his client to him in this action; *Held*, that the judgment debtor—the executor—was not either a necessary or proper party to the action. (ALLEN, J. dissenting.)

Fifth District, Syracuse General Term, December, 1863.

Before MULLIN, BACON, MORGAN and ALLEN, Justices.

THIS was an appeal by Peter G. Fox, one of the defendants, from an order of special term overruling his demurrer to the plaintiff's complaint. The complaint averred that Lawrence M. Fox recovered a judgment against Peter G. Fox, the executor of Archibald Fox, deceased, on the 24th of July, 1862, for \$1,862.24, besides costs. The taxed costs amounted to \$681.83, the whole amount being \$2,570.34. The action was brought by Peter G. Fox, the executor, against Lawrence M. Fox, and the judgment was for the demands which Lawrence M. Fox established against the estate, by way of counter-claim. The issues were referred to, and twice tried before a referee, occupying a great length of time. The case involved many very important questions, and frequently came before the court. The plaintiff was the attorney of Lawrence M. Fox, and besides arduous professional services performed for his client, he expended considerable money for necessary disbursements,

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&c., in defending the action. The complaint averred that all these services were rendered upon the express request of Lawrence M. Fox, and upon the agreement that the plaintiff should be paid for the same out of the avails of the judgment, so much as the services were reasonably worth, of which Peter G. Fox, the executor, had due notice. It also averred that such services, disbursements and expenses were, in consideration of the promises aforesaid, so rendered by the plaintiff as the attorney and counsel of Lawrence M. Fox, and were worth the sum of \$1500. That Lawrence M. Fox is indebted to him for the same, together with the interest thereon, from the day of the rendition of the judgment; that by reason thereof, the plaintiff became the equitable assignee of, and acquired a lien upon the counter-claim and demands of said Lawrence M. Fox, involved in said suit, and that immediately upon the rendition of said judgment, he became the assignee of, and acquired a lien upon the judgment aforesaid, of which Peter G. Fox, executor, had due notice. The complaint then claimed that Lawrence M. Fox owes the plaintiff a balance of \$106.95, for his services and expenses in a trover suit brought by Peter G. Fox, executor, against said Lawrence M. Fox, and that it was expressly agreed that the plaintiff should receive his pay out of the avails of the judgment in question. The complaint also averred that the plaintiff is the equitable assignee of, and acquired a lien on the judgment, in respect to this balance. It then averred that Lawrence M. Fox, being a resident of this state, departed from it with intent to defraud his creditors, and is now a resident of Michigan. The plaintiff claimed judgment against Lawrence M. Fox, for the sum of \$1606.95, besides interest, and for a decree declaring such judgment a lien upon the judgment recovered by Lawrence M. Fox against Peter G. Fox, executor, to the extent of the judgment to be obtained in this action against Lawrence M. Fox. The complaint contains no allegation of collusion

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between Lawrence M. Fox and Peter G. Fox, executor, to deprive the plaintiff of the benefit of his lien as attorney.

H. B. CUSHNEY, *for appellant, Peter G. Fox,*

Claimed that the action could not be sustained against Peter G. Fox, either for the purpose of determining the amount of the plaintiff's lien, or enforcing the lien, whatever it may be; that the lien of the attorney only extended to the taxable costs, in the absence of an agreement stipulating the amount of compensation, and that his lien could not be extended to include services performed, and expenses incurred in other suits. (1 *Barb. Ch. R.* 98; 2 *Paige*, 896; 15 *How. Pr. Rep.* 176; 4 *Barb.* 47; 18 *N. Y. Rep.* 868.)

H. C. ADAMS, *in person.*

1. Upon the case set forth in the complaint, the plaintiff in this action is the equitable assignee, and has a lien upon the judgment recovered by L. M. Fox against P. G. Fox, executor, &c., for the amount this plaintiff shall recover against L. M. Fox, whether the same depends upon an agreement or upon a *quantum meruit*. This has been expressly adjudicated in this very case (24 *How. P. R.* 409).

2. That motion (24 *H. P. R.*) was made by this plaintiff for the very purpose of obtaining the very relief sought by this action. It was then claimed by the counsel for the executor, that this plaintiff was not entitled to the relief sought by that motion, but must establish his claims against L. M. Fox "in the ordinary way, by action" (*see pp.* 413, 414).

It was also claimed by the counsel for the executor, that plaintiff's only remedy against the executor was by action (*p.* 414). Action against the executor for what? Why to obtain the very relief sought by that motion. Of course, there can be no such relief without making both parties

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to the judgment against the executor, defendants in this action, and the decree to be what was therein sought, viz.: payment of plaintiffs claims against L. M. Fox, out of his judgment against the executor; when the amount of those claims shall be ascertained. Upon that motion the court sustained the counsel for the executor upon those points, and held that to secure the lien claimed by this plaintiff, "the action for that purpose must be against all parties" (Bockes, J. *on p.* 418.)

The court also stated the true course to be pursued by this plaintiff to obtain the relief sought by that motion, viz.: by action to determine the amount or extent of the lien, and have a decree declaring the judgment subject to the lien, and for liberty to issue execution thereon for the amount, &c., as shall be ascertained in this action." It is to be presumed that that decision was, upon that point, in entire accordance with the demands of the counsel for the executor, upon that motion.

3. This action is accordingly brought for the very purpose, and in the very form claimed by the counsel for the executor, upon the motion stated, and therein expressly adjudicated, to be the only mode and form of relief. The executor having claimed and obtained the benefit of the adjudication stated, he is estopped from questioning its validity or correctness, by demurrer or otherwise (1 *Greenleaf's Ev.* §§ 186, 205). His defence, if he has any, must be one founded on facts set forth by answer.

The order appealed from should be affirmed.

MULLIN, J. The court of appeals decided unanimously in *Rooney agt. Second Avenue R. R. Co.* (18 *N. Y. R.* 368), that an attorney has a lien on a judgment recovered by him for his services in the prosecution or defence of the suit in which such judgment was recovered. Before the Code of Procedure became a law, the taxable costs in a

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cause were the measure of compensation between attorney and client (*McFarlan agt. Crary*, 8 *Cowen*, 259).

Since the Code, the taxable costs are no longer the measure of compensation, and the attorney and client are permitted to agree upon a fixed sum for the attorney's services, or that he may have a part of the judgment when recovered, or so much as his services may be worth. When, therefore, it is held to be the law that the lien of the attorney exists under the Code, it necessarily follows that the lien is for the measure of compensation the parties may legally agree upon. And so I understand the judges of the court of appeals to hold in the opinion delivered in the case of *Rooney agt. Second Avenue R. R. Co.*, cited *supra*.

I understand the plaintiff in his complaint to allege that no specific sum for services was agreed upon between him and Lawrence M. Fox, but the agreement he says, was that for his services in the first suit mentioned in the complaint, he should be paid out of the judgment recovered therein, so much as his services were reasonably worth. The same allegations are made in reference to the services in the subsequent suit. Plaintiff's lien then must be on the judgments for whatever his services shall be found to be worth.

In this action the amount of compensation must first be ascertained, and for that purpose L. M. Fox is of course an indispensable party, and with that question the executor has nothing whatever to do.

The plaintiff having a lien on the judgment, the next question is how is it to be enforced? A notice to the executor not to pay to the defendant, L. M. Fox, would ordinarily amply protect the executor. But the extent of the lien being undetermined, the executor cannot pay either until it is ascertained. That point would be settled in a suit between the plaintiff and L. M. Fox. The extent of the lien being settled, payment would be compelled by execution, or by application to the surrogate. The plaintiff, so long as he remained attorney on the record in the suits

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defended by him, could enforce payment in any manner the law permitted, and there would seem to be no necessity for commencing another suit. But the question is not whether an action to enforce the lien is necessary, but it is whether the plaintiff has the right to bring it. In settling that question, the plaintiff has the right to have the other allegations in his complaint taken into consideration, to wit: that L. M. Fox has departed from the state, with intent to defraud his creditors, leaving no property in this state other than the said judgment. That although the executor was notified of the plaintiff's rights and interests in a lien on said judgment, he has refused to pay to the plaintiff the amount of his demand against said L. M. Fox. I am unable to perceive how these allegations affect the question presented by this appeal. The absconding of the debtor gives plaintiff the right to proceed and attach the judgment. But his lien now is as ample as the one he would obtain by such a proceeding. And the executor, as I have already shown, cannot pay, until the amount to which plaintiff is entitled by way of lien is ascertained by the parties whose duty it is to liquidate that amount.

.. A refusal by the executor to pay, amounts to nothing so long as the party who demands pay is unable to name any sum to which he is entitled. Such a refusal does not entitle the party claiming to sue the executor; that right is given only to creditors of the estate of which the executor is the representative, whose duty it is to liquidate all claims against the estate. The plaintiff's claim is not of that class, and the amount due cannot be settled in any litigation between the plaintiff and the executor. When the plaintiff has procured the amount due to him from L. M. Fox to be liquidated, it will be the duty of the executor to pay it, and he cannot pay until then. If he shall then refuse, the plaintiff will proceed before the surrogate to compel an accounting and payment. Until this is done, the plaintiff's lien is as perfect as could be made by a judgment of this

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court. But it may be said that the plaintiff may make the executor a party to the suit against L. M. Fox, to the end that he may be adjudged to pay the plaintiff the amount found due to the plaintiff from L. M. Fox. No judgment requiring the executor to pay, without regard to the rights of other creditors, will ever be made until the executor shall have accounted, and it is found that there are assets sufficient to pay all the creditors. That accounting properly belongs in the surrogate's court, and there is nothing in this case making it necessary that the account be taken in this court.

It seems to me, therefore, that in no aspect of the case, is the executor a necessary or proper party to this action. If the plaintiff is still attorney, he may proceed with leave of the court, and issue execution, and collect the whole judgment, or call the executor to an account before the surrogate, and compel payment of the whole debt in that method. If the money is obtained in either, he can appropriate to his own use so much of it as he deems himself entitled to, subject to an adjustment with his client. Or he may prosecute a suit to judgment against L. M. Fox, for his services, and when he shall have obtained a judgment, the amount recovered will be the measure of his lien. If the executor will not, on presentation, pay that sum, then the plaintiff will be authorized to invoke the aid of the proper surrogate to compel payment.

I am, therefore, of opinion that the order overruling the demurrer should be reversed, on the grounds, 1st. That there is no joint cause of action against the executor and L. M. Fox, and that the executor is not either a necessary or proper party to the action.

ALLEN, J., *dissenting*. The plaintiff alleges an equitable assignment of the judgment from L. M. Fox, and asks to have it established by the judgment of this court; and the defendant, P. G. Fox, has no particular interest to

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defend, but was a proper party, to stay the funds in his hands until the rights of the parties could be settled. Judgment should be affirmed.

SUPREME COURT.

PETER B. ROSS, respondent agt. PATRICK CASSIDY, appellant.

A purchaser of personal property, though in good faith and for a valuable consideration, obtains no title from a person who wrongfully took the same from the owner.

He is bound to deliver the property to the owner on demand, if it be still under his control, or to account to him for its value, if he have parted with it.

The fact that the purchaser had, before demand, sold the property in good faith, without knowledge of the claim, cannot affect the owner's right to hold him responsible for it.

The true owner may maintain an action to recover the possession of his property, or its value, against a person who had purchased it in good faith from the wrongdoer, and had sold it in good faith, and without notice of the owner's rights, before the commencement of the action.

The remedy provided by the Code to recover the possession of personal property, is applicable to every case in which the action of replevin, as given by the Revised Statutes, would formerly lie.

The action of replevin in the *distinct*, is a substitute for the old action of *detinue*, and a remedy concurrent with *trover*.

Under the Code, the action to recover the possession of personal property may be maintained, notwithstanding the defendant had wrongfully parted with its possession before the suit was commenced.

And the purchaser of goods from a person having no title nor right to sell, acts wrongfully in selling the same property, though he make the sale in good faith, and in ignorance of the owner's rights.

He has no title to the property, and cannot rightfully deliver it to any person other than its owner.

Brooklyn General Term, February, 1864.

Before LOTT, BROWN, SCRUGHAM and BARNARD, Justices.

APPEAL from judgment rendered on trial before a referee. The plaintiff, and one George W. Brown and John Whitbeck, were the owners of an endless or belt saw, with the frame, wheels and pullies connected with it.

On the 20th of March, 1862, Whitbeck assigned his interest in the property to the plaintiff, and on the 12th of

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August, 1862, Brown assigned his interest in the same to the plaintiff.

In the fall of 1861, one Dorphus G. Simmons wrongfully took possession of, and carried away the said property, and broke up a large part of it into scrap iron, and sold and delivered the same to the defendant, who purchased it in good faith, and for a valuable consideration.

On the 14th of August, 1862, the plaintiff demanded the property of the defendant, who refused to deliver it to him, having sold the property in good faith, and without notice of the plaintiff's rights before the demand. The plaintiff immediately thereupon commenced this action.

The prayer of the complaint was in these words: "Wherefore the plaintiff demands judgment that the defendant may be adjudged to deliver the said property to him, and to pay plaintiff damages for the detention thereof, to the sum of five hundred dollars. And that said property may be forthwith delivered to the plaintiff, or that the defendant may be adjudged to pay to the plaintiff the sum of two thousand dollars, the amount of the value of the said property and damages, as aforesaid. And the plaintiff prays such other and further relief as may be just."

The case was tried before John C. Dimmick, Esq., as sole referee, who reported the foregoing facts, assessed the value of the property and damages, and derived the conclusion of law that the plaintiff was entitled to judgment in accordance with the prayer of the complaint, to which the defendant duly excepted.

Judgment was entered accordingly, and an appeal taken to the general term.

CLEMENT D. NEWMAN, *for appellant.*

I. The referee wrote no opinion. The respondent claimed, and referee held that the defendant wrongfully parted with the property, because he had no title. As he

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sold as innocently as he bought, he must on this theory have been a wrongful buyer, and not in good faith, for value. The settled doctrine of replevin is, that a bona fide purchaser is not a wrongful taker; he can only be sued in the *detinet*, and demand must be made, which is unnecessary where the defendant tortiously took and converted. If a man is a wrong doer in innocently selling that to which he had no title, is he not equally a wrong doer in innocently buying it when he could acquire no title? If the law says he is not liable in the *cepit*, because he innocently took, why should it not say he is not liable in the *detinet*, when he innocently disposed of it?

"A sale of personal property must be presumed to have been made in good faith, and it lies on the party impeaching it as fraudulent, to show the fraud" (*Lewis agt. Palmer, Hill & D. Sup.* 68). The case of *Nichols agt. Michael* (23 *N. Y.* 264), is not on parallel facts. One Pinner wrongfully took and transferred to Michael as his trustee—the court said Michael was not a bona fide purchaser. (*See at p.* 269) "The positive authority of a decision is co-extensive only with the facts upon which it is based" (*Lord Coke*). Neither does the court decide that innocent disposition by innocent buyer is wrongful.

Brockway agt. Burnap (16 *Barb.* 309); *Savage agt. Perkins*, (11 *How.* 17); here was no bona fide purchaser; if plaintiff had sued defendant's vendor, these cases would apply.

In *Tillinghast & Shearman's Practice* (vol. 1, pp. 622 and 623), the cases are all collected, and the authors say: "On reviewing all the decisions, and carefully examining the actual facts of the cases which were before the courts for decision, our conclusion upon this point is, that an action in the nature of replevin may be brought against a party who had wrongfully disposed of the property before the commencement." No case has been brought before the courts on facts similar to this one. The non-liability of a

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person occupying the position of this defendant, has been considered as settled law, sense and justice. Such opinion is intimated and decided in *Nash agt. Fredericks, supreme court, first district* (12 Abb. 147).

Why should the R. S. prescribe that the declaration in replevin "shall allege" the detention, unless proof thereof was necessary to the maintenance of the action (*R. S. 5th edition, vol. 3, p. 845, § 6*).

If a defendant disposes of property knowing of the owner's rights, then he is a wrongful disposer. Such is not this case.

The judgment should be reversed, and the report of the referee set aside, and he be directed to find judgment for the plaintiff for the recovery of the possession of the saw blade only, with damages for its detention, and its value as before assessed.

ALBERT COMSTOCK, *for respondent.*

I. The only question raised by the exceptions, is as to the plaintiff's right of action to recover the possession of the property or its value, which the defendant had parted with before the demand.

II. The plaintiff and respondent, as the true owner of the personal property in question—he may reclaim his property under any circumstances, and hold any person responsible who has assumed the right to dispose of it. And a purchaser in good faith, and for a valuable consideration, acquires no title nor authority to sell. The maxim *caveat emptor* applies; the purchaser must look to the seller for indemnity. *Williams & Chapin agt. Merle*, 11 Wend. 80; *Ensell agt. Coffin*, 6 Wend. 609; *Prescott agt. DeForest*, 11 John. 159.)

III. No man can lawfully dispose of the property of another, without some lawful authority to do so; any other disposition is wrongful within the meaning of the authori-

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ties on the subject. And if a person has disposed of personal property without being authorized by law to do so, i. e., wrongfully, he may yet be said wrongfully to detain it; in contemplation of the law it is in possession until he has lawfully parted with it. But if it were otherwise, this action will lie in favor of the true owner against a person who has parted with, and, at the commencement of the suit, is not in fact nor in law in possession of the property. And the law wisely provides for judgment in the alternative. (*Brockway agt. Burnap*, 16 *Barb.* 309; *Savage agt. Perkins*, 11 *How.* 17; *Nichols agt. Michael*, 23 *N. Y.* 264; *Code*, § 277.)

(a) A distinction is here to be observed—the provisional remedy of claim and delivery, and of arrest, under the Code, cannot be had unless the property is still in the possession of the defendant, or has been removed or disposed of (*eloigned*), with intent that it should not be taken by the sheriff, or recovered by the plaintiff in the action.

(b) Judgment may be had in the alternative, for the recovery of the property or its value, if a delivery cannot be had, but not the provisional remedies before judgment (*Pike agt. Lent*, 4 *Sand. S. C.* 650).

(c) This is the nearest approach to an adverse authority to be found among the adjudications of the courts of this state, except in *Brockway agt. Burnap*, at circuit (12 *Barb.* 347), which was overruled at general term (16 *Barb.* 309), and the doctrine of the general term is approved in *Nichols agt. Michael* (23 *N. Y.* 264).

IV. The defendant and appellant acted dishonestly and in his own wrong, in not explaining that he had parted with a portion of the property at the time the demand was made.

V. The judgment should be affirmed with costs.

By the court, SCRUGHAM, J. The defendant, though a purchaser in good faith and for a valuable consideration,

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did not acquire any property in the articles in question by purchasing them from a person who wrongfully took from the real owner, but was bound to deliver them to the latter on demand, if they were at the time in his possession, or under his control, or to account to him for their value, if he had parted with them; and the fact that he had, before demand, sold them in good faith, and without knowledge of the claim, could not affect the owner's right to hold him responsible for them.

These positions are not disputed, and the only question presented on this appeal is as to the remedy of the true owner; i. e., whether he can maintain an action to recover the possession of the property or its value, against a person who had purchased it in good faith from a wrong doer, and had sold it in good faith, and without notice of the owner's rights, before the commencement of the action.

The remedy provided by the Code to recover possession of personal property, is applicable to every case in which the action of replevin, as given by the Revised Statutes, would formerly lie (*Nichols agt. Michael*, 23 N. Y. R. 264), and while it is true that replevin in the *cepit*, would not lie against the bona fide purchaser, from one who had wrongfully taken the property, replevin in the *detinet* would. The action in that form was a substitute for the old action of *detinue*, and a remedy concurrent with trover (*Barrett agt. Warren*, 3 Hill, 348).

The wrong upon which replevin in the *cepit* was founded, was the wrongful taking from the owner the possession of his property, and as none could be liable to it who had not participated in that trespass, it could not be maintained against the innocent purchaser from the wrongdoer.

But such purchaser acquires no rights in the property as against the true owner,—his holding it is in wrong of the owner, and it was upon this wrong that the old action of *detinue* was founded, and, as I have said, replevin in the

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detinet as given by the Revised Statutes, was a substitute for that action. /

Detinue could be maintained, although the defendant had parted with the possession of the property before suit brought, and under our statute abolishing that form of action, replevin would lie in such a case. (2 R. S. 522, §§ 11 and 19; 22 Wend. 602.) That under the Code the action to recover personal property may be maintained, notwithstanding the defendant had wrongfully parted with its possession before the suit was commenced, is distinctly held in the case of *Nichols agt. Michael*, before cited.

The act of the defendant in selling the goods, though performed in good faith, and in ignorance of the plaintiff's rights, was nevertheless wrongful, as he had no title to the property, and could not rightfully deliver it to any other than its owner. (*Nichols agt. Michael, supra*; *Brockway agt. Burnap*, 16 Barb. 309.)

The judgment should be affirmed with costs.

COURT OF APPEALS.

GUNNING S. BEDFORD, respondent agt. HENRY TERHUNE AND
CHARLES B. EDWARDS, appellants.

A lessor cannot recover against a third person for the use and occupation of premises, unless he shows a *surrender of the original lease*.

In the absence of any evidence of the bargain under which defendants entered into possession of the premises, and it appearing that they occupied the whole of the unexpired term of the lease to the original lessees, *Held*, that the fair presumption was, that they entered for the whole of such unexpired term, and as such interest is given not by an under lease, but by an *assignment*, the presumption must be that the defendants were in as *assignees*, and not as under-tenants. But if they were in as under-tenants, they would not be liable to the lessor for the rent, either in an action on the lease, or for use and occupation.

Where in an action for *use and occupation* to recover by the lessor of the defendants a quarter's rent of premises, and it appeared from the evidence that the defendants occupied as assignees of the lease, *Held*, that although the plaintiff could not sustain his action for use and occupation, upon which judgment was rendered

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in his favor in the court below, but must recover, if at all, upon the *covenants in the lease*; yet this court, on appeal, was authorized to decide that the court below was at liberty on the trial to *amend the complaint so as to conform it to the proof*; and by thus holding that the defendants were liable, as assignees of the term, for the rent claimed, the judgment of the court below was affirmed. That is, this court on appeal, in an action originating in a justice's court, for *use and occupation*, to recover on a *quantum meruit*, an amount of rent, will change the action to that of *covenant on a lease*, to recover the rent specified by the lease, where the proof on the trial shows that the latter action only can be sustained.

THIS is an appeal from a judgment of the general term of the New York common pleas, rendered July 18th, 1859, affirming a judgment of the N. Y. marine court against the defendants for about \$500. By an order of the N. Y. common pleas, the defendants obtained leave to appeal to this court.

The action was brought by the plaintiff, as owner of a building, No. 48 Courtland street, N. Y., to recover of the defendants, as his tenants, the sum of \$450 as a reasonable price for the use and occupation of the premises from February 1st, to May 1st, 1858. The defendants denied that the relationship of landlord and tenant ever existed between them and plaintiff, and averred an outstanding subsisting title by deed, derived from plaintiff, to the premises, in Elias Ingraham, Andrew Ingraham, Edward Ingraham, and Edmund C. Stedman, composing the firm of E. & A. Ingraham & Co., for the period in question, and that the defendants had hired, used and occupied the premises solely as sub-tenants of E. & A. Ingraham & Co., and that the plaintiff had never had a surrender of the Ingrahams' term, and never had recognized the defendants as his tenants; that defendants were not indebted to plaintiff.

The issues were tried before Mr. Justice MAYNARD and a jury. The plaintiff called only one witness.

The facts as disclosed by the evidence on the trial, were substantially as follows: On the 1st of August, 1855, plaintiff leased the premises in question to Messrs. E. & A. Ingraham & Co., by sealed agreement, for a term ending

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May 1st, 1858, to be occupied as a clock store. Under this lease they took possession of the premises, and the rent thereby reserved was punctually paid to plaintiff until February 1st, 1858, inclusive. Prior to May 1st, 1856, Messrs. E. & A. Ingraham & Co. failed in business, and the defendants thereupon went into possession of the premises, and used and occupied the same for a clock store, until May 1st, 1858. From May 1st, 1856, to February 1st, 1858, inclusive, the rent of the premises was paid by the hands of defendants, upon "receipts written according to the dictation of defendants," signed by plaintiff, to the effect that the rent was "received for account of Messrs. E. & A. Ingraham & Co.," for rent of store, &c., pursuant to the terms of the written lease. There was no other communication whatever between plaintiff and Messrs. E. & A. Ingraham & Co., during the period in question. At the time of the failure of Messrs. E. & A. Ingraham & Co., and after defendants had entered into possession, the plaintiff met defendants on the premises. Defendants said, that "they intended to occupy the store for the same business" as Messrs. E. & A. Ingraham & Co., who had failed, and the plaintiff "need not fear, or be concerned about the rent." On May 1st, 1858, plaintiff's agent requested the defendants to pay "the rent" for the last quarter. They replied, "they had paid money enough on account of E. & A. Ingraham & Co., and should pay no more;" that E. & A. Ingraham & Co. owed them largely. There was no other evidence in the case, except the plaintiff's agent stated he had a conversation with defendants, in March, 1858, in presence of plaintiff, about hiring the store from him for a year, from May 1st, 1858, in which they said they ought to have it, as "they were among the plaintiff's best tenants, and had always paid punctually;" and also, that on two occasions while defendants occupied the store, they offered notes for "the rent," which were not accepted. Whose

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notes the defendants had thus offered as stated, witness did not know, but supposed they were notes of defendants.

I. The defendants requested the court to dismiss the complaint, because of the failure of proof of any agreement sustaining the alleged relation of landlord and tenant between the parties.

II. The court having refused this request, the defendants requested the justice to charge the jury, that if there was any such agreement, it was (if anything) a collateral promise to pay the debt of E. & Ingraham & Co., as expressed in their written lease, for the period in question, and therefore void by the statute of frauds.

III. The justice having also refused this request, then charged the jury in substance and effect, that if "they believed the parties made the agreement as sworn by the witness, and entered upon it at the time it was made, and carried it out up to the last quarter, by the one party paying and the other receiving the rent each quarter, then the defendants were liable for the rent." The jury found a verdict for the plaintiff for the whole amount claimed.

MATHEWS & SWAN, *attorneys, and*

ALBERT MATHEWS, *counsel for defendants.*

First.—There being an outstanding lease from the plaintiff to third persons, in writing, under seal, for the entire period defendants used and occupied the premises in question, such "use and occupation" alone would not render the defendants liable in this action. Unless there was both a surrender of this lease by such third persons to, and an acceptance thereof by the plaintiff, and also a valid agreement between plaintiff and defendants, that they should use and occupy the premises as his tenants, paying rent therefor to him as such tenants, there was no privity between the parties, and the plaintiff could not recover.

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I. This action is statutory, and requires proof of an actual "agreement" to sustain it. (1 *Rev. Stat.* 748, § 26; *Hall agt. Southmayd*, 15 *Barb. Rep.* 32.)

II. Proof of mere "use and occupation," without such agreement, will not entitle the owner of the land to recover in this action rent from the occupant (*Smith agt. Stewart*, 6 *Johns. Rep.* 46).

III. Where there is an outstanding subsisting lease of the same premises, this action for "use and occupation" will not lie against the occupant, unless he went into possession under some new and distinct agreement of letting and hiring between him and the owner. (*Dartmouth College agt. Clough*, 8 *New Hamp. R.* 22; *Glover agt. Wilson*, 2 *Barb. R.* 264.)

IV. In this case the defendants, from the fact of being in possession, would have been (in the absence of other proof) presumed to be the assignees of the outstanding term, and by privity of estate might have been liable as such in an action specially, upon the deed of lease from plaintiff to Messrs. E. & A. Ingraham & Co. Had the plaintiff pursued that remedy, it would then have been incumbent upon the defendants to have gone into their defence, and shown more explicitly that they were sub-tenants of the real lessees (*Quackenboss agt. Clarke*, 12 *Wend. R.* 555).

V. While this unexpired lease was outstanding and not surrendered, any parol agreement of defendants made with plaintiff to pay the very rent reserved thereby, would have been void by statute (unless in writing), as a promise to answer for the debt, &c., of a third person. (*Jackson agt. Rayner*, 12 *Johns. R.* 291; *Newcomb agt. Clark*, 1 *Denio R.* 226; *Mallory agt. Gillett*, 21 *N. Y. R.* p. 412.)

VI. Unless there was a surrender of the Ingrahams' lease, any agreement by defendants to pay anything to plaintiff for their mere use and occupation of the premises, would have been also *nudum pactum* for want of consideration. The plaintiff had no interest or estate in possession,

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in the premises. The defendants being in possession, no consideration could move from plaintiff to sustain any promise made to himself by defendants to pay him for permission to occupy the premises for the period in question (*Van Alstyne agt. Wemple*, 5 Cow. Rep. 162).

VII. While this lease subsisted, and so long as the rent reserved in the lease was paid to and accepted by the plaintiff, he had no right of entry or possession, and could not have given to or withheld from the defendants even a license to enter or remain in possession. No person except the lessees under the deed, or their assignees, had power or authority so to do (*Lucky agt. Frantzkee*, 1 E. D. Smith, N. Y. C. P. Rep. 47.)

Second.—The lease of the premises made by the deed of the plaintiff, August 1, 1855, subsisted in full force and effect until its expiration, May 1st, 1858, and was never surrendered.

I. There was no evidence offered on the trial, and no suggestion there made by plaintiff or the court, and no matter of evidence submitted to the jury touching the question of a surrender of this lease.

II. There was no pretence upon the trial that the original lessees were privy to, or gave consent to, or had any notice of any understanding or agreement whatever, between plaintiff and defendants, concerning the premises in question. The first suggestion of such a notion is found in the opinion of DALY, J. There is no color for it in the evidence, and it has no foundation in fact whatever (*Ogden agt. Sanderson*, 3 E. D. Smith N. Y. C. P. Rep. 166).

III. A lease created by deed cannot be surrendered without the assent legally expressed of both lessor and lessee, or their representatives. A surrender is a contract, and can be made only by the parties owning the leasehold and the reversion. This contract must be "in writing," or must result from the acts of the parties by "operation of law" (2 Rev. Stat. p. 134, § 6).

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1. Not even the destruction and cancellation of the written lease by the parties thereto, with intent to surrender the term, will without other acts, operate as a surrender. (*Rowan agt. Lythe*, 11 *Wend. Rep.* 622; *Fisher agt. Milliken*, 8 *Penn. Rep.* 111.)

2. Nor will the mere delivery of the key of the demised premises to the lessor by the lessee, who has abandoned possession, operate as a surrender of a mere parol lease (*Townsend agt. Albers*, 3 *E. D. Smith N. Y. C. P. Rep.* 560).

3. Neither will the fact of the landlord's making out his bill for rent of the premises, against an assignee in possession, as if the rent were payable by him as a tenant directly to the landlord, or the circumstance of payment and receipt of such rent without objection, warrant the presumption of a surrender of the lease. (*Damb agt. Hoffman*, 3 *E. D. Smith N. Y. C. P. Rep.* 361; *House agt. Burr*, 24 *Barb. Rep.* 527.)

4. A surrender of a lease "by operation of law," cannot be presumed, except from the acts of the parties to the instrument indicating a clear intention to that effect (*Van Rensselaer's Heirs agt. Penniman*, 6 *Wend. Rep.* 568).

(a) "The giving a second lease to a third person, does no prejudice to the first lessee; the lessor, in fact, has no power; the second lease is of no force" (*Ibid*, *SAVAGE, Ch. J.*).

5. The acceptance by the lessor of a proposed surrender, and the consequent valid and binding discharge of the lessee from all future liability under the lease, are essential to constitute an actual and valid surrender. (*Whitney agt. Myers*, 1 *Duer's R.* 275; *Ogden agt. Sanderson*, 3 *E. D. Smith N. Y. C. P. Rep.* 166.)

IV. The case in question being by deed, creating a term of more than two years (ending May 1, 1858), could not have been surrendered by a parol arrangement, agreement or understanding, had between plaintiff and defendants, prior to May 1st, 1856, to allow them to occupy as tenants

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for the remainder of the term, even if it had been assented to by the original lessees. Besides, such agreement, being in effect a lease of more than one year, would have been of itself void by the statute, because not in writing. (2 *Rev. Stat.* 134, § 6; *Schieffelin* agt. *Carpenter*, 15 *Wend. Rep.* 406.)

V. The plaintiff, moreover, never did any act, or suffered any circumstance to occur, by which he was in any manner debarred from recovering all rent unpaid from the original lessees. His right and remedy against them is still perfect. Their liability is in all respects still unimpaired (*Schieffelin* agt. *Carpenter*, 15 *Wend. Rep.* 406).

Third.—There was no agreement or evidence of any valid agreement between plaintiff and defendants, constituting either the relationship of landlord and tenant, or any privity of contract between them.

I. No inference or presumption of such relation or privity can arise from the mere circumstance of the payment of rent by defendants directly to plaintiff. (*Acker* agt. *Witherell*, 4 *Hill Rep.* 112; *Benson* agt. *Bolles*, 8 *Wend. Rep.* 180.)

1. It might be suggested that there is no circumstance shown from which it can be inferred the defendants did not also pay additional rent to the Ingrahams.

2. It was the clear right and privilege of the defendants, in their character as sub-tenants of the actual lessees, to pay even their own rent (due from them to E. & A. Ingraham & Co.,) directly to the plaintiff, as the original lessor, in order to protect their possession. In view of the insolvency of Messrs. E. & A. Ingraham & Co., it was prudent and natural to do so for that purpose alone (*Peck* agt. *Ingersoll*, 3 *Seld. Rep.* 528).

3. The defendants, moreover, by the explicit language of the receipts they took from plaintiff, were cautious in every instance to preclude the idea of any privity between themselves and plaintiff, and to express emphatically, their intention to pay, not for any liability of themselves to

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plaintiff, but solely "for account of E. & A. Ingraham & Co.," the actual lessees.

4. It is also wholly immaterial in this action whether they paid these "moneys as agents, attorneys in fact, or assignees of the term" (*see opinion of BRADY, J.*), or as sub-tenants. In any event, it is impossible that they were paid in any manner "for account of E. & A. Ingraham & Co.," unless their original lease, and their liability under the same, was still outstanding.

II. Neither could such inference be drawn from "the fact that defendants succeeded to the business of E. & A. Ingraham & Co., or carried on a similar business in the same premises, after the failure of that firm" (*see opinion of DALY, J.*). This fact on the contrary, tended to show the direct privity of defendants with the actual lessees, and that the defendants' occupancy was derived from the permission of Messrs. E. & A. Ingraham & Co., and consequently rebutted any possible presumption of privity with plaintiff.

III. Neither could such relationship or privity between plaintiff and defendants be inferred from the fact that after they had taken possession, "at the outset of their occupation, or when the plaintiff was first advised that they meant so to occupy and carry on the same business, they gave him assurance he need feel no concern about his rent." The subject matter of the conversation was "the rent," reserved in the written lease executed to the actual lessees. Taken most strongly against the defendants, it was only a parol expression of their intention (in order to protect their possession), either to pay the rent for E. & A. Ingraham & Co. to plaintiff, or to see that it was paid by some one; or (as they lawfully might do) to pay such rent as should become due by themselves as sub-tenants under E. & A. Ingraham & Co., directly to the plaintiff, as their superior landlord. No suggestion was made by plaintiff or defendants in this conversation, of any "new or distinct agree-

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ment of letting or hiring between them," or that they contemplated such a thing, if possible.

IV. Nor is there in view of the facts shown upon the trial of this cause, any color for the judicial suggestion that because the defendants in March, 1858, "wanted to hire the store for another year, urging as a reason to induce plaintiff to let it to them, that they were among his best tenants, and had always paid punctually;" these circumstances warranted the jury in finding the defendants had held and occupied the premises from May, 1856, to May, 1858, "under a distinct and independent agreement with plaintiff, and not as tenants under a demise from E. & A. Ingraham & Co., notwithstanding the form in which the receipts were drawn." (*See opinion of DALY, J.*)

1. If there had been any such "distinct and independent agreement," nothing would have been easier for the plaintiff than to have shown it.

2. To allow such an inference, would be illegally to indulge a presumption for the benefit of the plaintiff, and in his favor, inconsistent with and in opposition to his allegations as expressed in his receipts. It is legally and logically impossible that the receipts could express the truth, and the defendants be the immediate tenants of the plaintiff at the same time (*Andrews agt. Chadbourne, 19 Barb. R. 147*).

3. The declarations of the defendants in the conversation mentioned, were made to the plaintiff with reference to well-known facts, being the same as proved on this trial. It is irrational and unjust to separate the loose colloquial expressions of common men from their subject matter, in order to construe them into solemn admissions of abstruse legal rights and liabilities. The defendants were subtenants, and had "paid punctually" for account of Messrs. E. & A. Ingraham & Co. The plaintiff knew these facts, and the defendants reminded him of them, as showing their solvency and punctuality. They had no intention or thought

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of suggesting that they stood in any relation to plaintiff other than as sub-tenants, who had paid him rent as expressed in the receipts (*Davis agt. Illius*, 9 *How. Pr. Rep.* 452).

V. Almost every necessary requisite of such an agreement is wanting in all the intercourse between plaintiff and defendants. There was neither proper subject matter or consideration, or assent of minds in the premises.

1. The defendants went into possession, and occupied, without authority or permission derived from plaintiff.

2. The plaintiff had no right or interest in the possession of the premises until May 1st, 1858, as there was no default in payment of rent until that time.

3. Defendants never asked of plaintiff permission to use and occupy the premises, and plaintiff had no right to give, and never gave or assumed to give them such permission.

4. Plaintiff had nothing to grant, and defendants requested nothing of him in the premises.

5. To constitute a "hiring," there must be a landlord having an estate, and a tenant requesting the grant of a term. Here the supposed landlord had nothing to grant, and the supposed tenant already possessed the term he wished, and was liable in law and fact to pay rent to third persons, who were the actual owners of an estate for years in the premises.

6. The language and acts of the defendants, left no doubt as to their knowledge of their rights, for they said they had what they wanted, and meant to keep it.

7. The defendants never requested or desired to become the tenants of plaintiff for the period in question, and the plaintiff never offered to allow them so to be.

8. Plaintiff never dreamed of releasing the lessees who held under the deed. He has never done an act or said a word to estop him from claiming from them their unpaid rent.

VI. The adjudicated cases relied on by the plaintiff to

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justify the assumption that there was evidence adduced on the trial "to support a finding by the jury that defendants held under a distinct and independent agreement with the plaintiff," are each *sui generis*; dependent upon their peculiar facts in dispute, and do not warrant such an inference in this case.

1. In the *nisi prius* case of *The Drury Lane Company agt. Chapman* (1 *Carrington & Kirwin R.* p. 14), the lessee died before the defendant took possession; no letters of administration were issued until after the accruing of the rent, and this suit brought for its recovery. It could not, therefore, be presumed that the defendant had occupied either as sub-tenant or assignee of the deceased lessee. Besides, it was distinctly proved by a witness, and not contradicted, that after the death of the lessee, "the defendant applied to the plaintiffs to take him as their tenant on the same terms as the lease, and they accepted him." The other points made on this appeal were not raised or discussed in that case.

2. In the case of *McFarlan agt. Watson* (3 *Comst. Rep.* 286), the lease being by parol, and for a single year, a parol surrender of it was valid. The defendant paid no rent to the original lessee, and he was not shown to be insolvent. The lessee, too, had requested the landlord to give the lease to the defendant. "No reason was shown why," say the court, "the rent was not paid to the original lessee if the defendant did not intend to recognize the owner as his landlord." None of the receipts for rents showed a recognition of an outstanding title in the original lessee. The last receipt was precisely such as if the rent had been paid to plaintiff by defendant as an immediate tenant, and was considered by the court to "afford a strong presumption that the defendant, by the assent of the first lessee, had become the immediate tenant of the premises under the owner." The court press strongly the proposition that the sub-tenant must be presumed to have intended to recog-

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nize the owner as his own immediate landlord, else he would not have paid him rent, because such "payment did not discharge the defendant from his liability to" the first lessee. The subsequently reported case of *Peck* agt. *Ingersoll* (3 *Seld. R.* 528), establishes a rule of law which now forbids such presumption. Moreover, it should be observed the case as reported does not purport to furnish all the evidence submitted to the jury. None of the other questions involved in this argument were discussed in that case.

Fourth.—The defendants are not within the rule which estops a tenant from denying the title of his landlord. They deny the relationship, and the burden of proof is with the plaintiff. Until that is established, they are not put to their defence. To say the defendants are plaintiff's tenants, and therefore cannot avail themselves of the outstanding title proved by plaintiff's witness to exist in Messrs. E. & A. Ingraham & Co., assumes the only fact plaintiff was bound to prove. This is more monstrous too, after he has himself disclaimed any such relationship with defendants by his written receipts.

Fifth.—The court erred in allowing plaintiff's witness (who confessed he had no knowledge on the subject) to conjecture whose notes the defendants had once offered in payment of rent to plaintiff.

I. The jury may have inferred that by offering their own notes to plaintiff, the defendants meant to acknowledge an immediate indebtedness to him, and were therefore, as tenants, in direct privity of contract with him.

II. If there was any evidence whatever, fairly proper to be submitted to the jury, upon the question at issue, it was so feeble and slight as to deserve the most scrupulous caution on the part of the court to prevent its being colored or strengthened by any illegal evidence whatever.

III. Even if the judge had actually and in effect told the jury to disregard this evidence, after having impro-

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perly admitted it, the defect would not be cured (*Erben agt. Lorillard*, 19 *N. Y. Rep.* 299).

IV. It is out of the province of the court upon this appeal to speculate upon the degree of effect this evidence may have produced upon the minds of the jury. It matters not if the evidence were even cumulative, or the fact proved by the defendants themselves, if the evidence could, in any aspect, have any effect that might tend to prejudice the defendants, this exception is fatal (*Worrall agt. Parmlee*, 1 *Comst. Rep.* 519).

Sixth.—The court erred in refusing to dismiss the complaint.

I. There was no evidence of any agreement between plaintiff and defendants establishing the legal relation of landlord and tenant between them, fit to be submitted to a jury.

II. If there was any evidence tending to give color to the suspicion of such an agreement, it went to prove a contract void by the statute of frauds.

III. There was no contradictory evidence, and there was nothing to submit to the jury. The plaintiff failed to establish the fact upon which alone he could recover, and he ought to have been nonsuited.

Seventh.—The justice erred in his charge to the jury.

I. There being no dispute about the facts, so far as the same were in evidence, the justice had no right to give the jury a license to conjecture what particular relationship might possibly have existed between plaintiff and defendants, of which there was no evidence (*Story agt. Brennan*, 15 *N. Y. R.* 524).

II. The justice's charge was tantamount to telling the jury to find for the plaintiff. He told them in effect, that if they believed there was such an understanding or agreement between plaintiff and defendants, as he assumed had been sworn to by the only witness produced, then in law the defendants were liable for the rent.

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III. The charge of the justice must unavoidably have misled the jury. There was no "agreement sworn to by the witness," and no question of the credibility of the witness, or any disputed evidence whatever, as erroneously assumed by the justice. (*Read* agt. *Hurd*, 7 *Wend. R.* 411; *De Groot* agt. *Van Duzer*, 20 *Wend. R.* 402; *Dolsen* agt. *Arnold*, 10 *How. Pr. Rep.* 531; *Haskins* agt. *Haskins*, 9 *Gray's Rep.* 39.)

IV. In point of fact the only question thus submitted to the jury by the justice was the credibility of a witness; a witness, too, who was not impeached in any manner by the defendants.

Eighth.—The verdict was also against the weight of, as well as against the legal effect of the evidence.

Ninth.—The judgment should be reversed with costs.

REYNOLDS & VAN SCHAICK, attorneys, and
PHILIP REYNOLDS, counsel for plaintiff.

First.—Whether there was an agreement, express or implied, between the plaintiff and the defendants, by which the relation of landlord and tenant existed between them, in respect to the premises, was a question of fact to be established to the satisfaction of the jury. (*Theatre Royal Drury Lane Company* agt. *Chapman*, 1 *Carrington & Kirwin*, 14; *Glover* agt. *Wilson*, 2 *Barbour*, 264; *McFarlan* agt. *Watson*, 3 *Comstock*, 286.)

Second.—The existence of such an agreement was proved by the witness Jackson.

The proof of an express contract is not indispensable; "a contract may be implied from the occupation of the premises and payment of rent." (*Porter and another* agt. *Bleiler*, 17 *Barbour*, 149; *Edward* agt. *Clemons*, 24 *Wendell*, 480; *Pierce* agt. *Pierce*, 25 *Barbour*, 243.)

Third.—The action for use and occupation may be maintained where the holding is upon an implied, as well as

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where it is upon an express permission of the landlord. (*Osgood* agt. *Dewey*, 13 *Johnson*, 240; *Pierce* agt. *Pierce*, 25 *Barbour*, 243.)

When the plaintiff heard that Ingraham & Co. had failed, he and his agent (the witness Jackson) went to the store and saw the defendants. "They said that Ingraham & Co. had failed; they said that the doctor need not fear or be concerned about the rent; they said that they intended to occupy the store for the same business," with the plaintiff's permission, was of course implied, if not expressly said. There is no evidence that the plaintiff made any objection. The only reasonable presumption from the evidence is, that he assented, and that the defendants from thenceforward continued to occupy the premises with his permission. The evidence is, "they did continue to occupy the premises and paid the rent."

Although the defendants in their answer allege (what they did not prove or attempt to prove), that they "hired, used and occupied the [said] premises solely as the tenants of [said] Elias Ingraham, Andrew Ingraham, Edward Ingraham and Edmund C. Stedman," "and of no other person whomsoever," there is no proof that they ever made any such pretence or statement to the plaintiff or his agent. On the contrary, in March, 1858, in the middle of the quarter for the rent of which this action is brought, when they wished to hire the premises for another year, "they said they ought to have them for a year, from the first of May, 1858, as they were among the doctor's best tenants, and had always paid punctually." The plaintiff and his agent were both present, and there is no proof that either disputed these statements of the defendants. Such being the facts, and it being also proved by the witness Jackson, and by the receipts written by their dictation, and which they read in evidence, that they paid the plaintiff the rent of the premises from February 1, 1856, each quarter as it became due, up to February 1, 1858, the further statements

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in their answer that "the plaintiff never recognized the defendants as his tenants, or in any manner accepted a surrender of the lease of said premises to E. & A. Ingraham & Co.," is not to be credited, because wholly untrue.

Fourth.—It was for the jury to say from the evidence, whether there was not a surrender of the lease made to Ingraham & Co., and a new letting and hiring between the plaintiff (the owner of the premises) and the defendants.

"Whether there be such new arrangement, and possession under it, is a matter of fact for the jury." (*Glover agt. Wilson*, 2 *Barbour*, 264; *Theatre Royal Drury Lane Company agt. Chapman*, 1 *Carrington & Kirwin*, 14.)

"The true rule seems to be, that a new lease of the premises, whether by parol or not, if valid, will operate in law as a surrender of the former lease" (*Smith agt. Niver and Rokcefeller*, 2 *Barbour*, 180).

Fifth.—The validity of the new lease whether by parol or in writing, can only be questioned where the former lease is by deed, which the lease to E. & A. Ingraham & Co. was not, although a seal was affixed thereto.

The lease was good for a demise of the premises for the term therein mentioned, and the seal thereon did not affect its validity for that purpose, and although the witness Jackson, who signed the plaintiff's name to the lease, by himself as agent, and affixed a seal thereon, swore that he had authority to execute the paper, that was not enough to make it a deed. That could only be established by evidence that he acted under a power of attorney, under seal, executed by the plaintiff. And so of the counterpart, executed by E. & A. Ingraham & Co., which had also a seal attached to the firm-name. No member of the firm could make a deed without a power of attorney, under seal from his copartners, and in that case the name of each partner should be signed, with a seal attached to each signature. The counterpart being signed by the firm-name, was as valid for all the purposes for which it was intended,

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as if it were a deed, and the seal upon it did not affect its validity or make it a deed.

But in the absence of any evidence fixing the term of a lease by parol, as was the case in respect to the letting of the premises by the plaintiff to the defendants, when E. & A. Ingraham & Co. had failed, the legal presumption construes it to be a letting for one year only, and thus being valid, according to the principle laid down by the court in *Scheffelin agt. Carpenter*, (15 *Wendell*, at pp. 406 and 407,) it would operate as a surrender of the old lease, even if such lease should be held to be by deed.

Sixth.—But should the lease to E. & A. Ingraham be held to be a deed, that would not help the defendants. They are nevertheless bound to pay the plaintiff for the use and occupancy of his premises while they held and occupied the same. (*Scheffelin agt. Carpenter*, 15 *Wendell*, 400; see opinion of Judge NELSON, p. 406, near the foot of the page.)

Seventh.—Although the defendants failed to prove the allegation in their sworn answer, that they hired, used and occupied the said premises solely as the tenants of the persons composing the firm of E. & A. Ingraham & Co., they are estopped from denying that such was the fact, and hence, upon the assumption that said premises were let to the defendants by said firm, such letting, unless with the written consent of the landlord, was a forfeiture of the lease by its terms.

Where a condition annexed to an estate for years is broken, the estate *ipso facto* ceases as soon as the condition is broken, without an entry; (4 *Kent's Com.*, p. 128.) The only exception to this rule is where the lease provides expressly that the landlord shall re-enter in case of a breach of the condition. (9 *Paige*, p. 431; 6 *Barn. & Cresswell*, p. 519.)

Eighth.—The possession of the lease to E. & A. Ingraham & Co. by the defendants, and their dictation of the

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receipts given to them by the plaintiff's agent for the eight quarters rent they paid, is strong presumptive evidence that they knew that said firm could not lawfully "let or underlet the premises without the written consent of the landlord."

Ninth.—Where there is no proof on the subject, it is not to be presumed that E. & A. Ingraham & Co. violated their covenant to the plaintiff, and let the premises to the defendants, as is set up in their answer; and in the absence of any proof to support their answer, or that the plaintiff gave consent in writing to such letting, it cannot be reasonably presumed that they occupied the premises in any other manner than as tenants of the plaintiff.

The lease made by the plaintiff, about the first of August, 1855, was to the firm of E. & A. Ingraham & Co., and not to Elias Ingraham, Andrew Ingraham, Edward Ingraham and Edmund C. Stedman, the persons from whom the defendants, in their answer, aver they hired the premises.

There was no proof showing that the four last named persons constituted the firm of E. & A. Ingraham & Co.

There was no proof that the defendants hired, used or occupied the premises as tenants of said four persons, or of said firm, or that the defendants had entered into possession of said premises as tenants of said four persons, or of said firm, or by the authority or permission of either.

Tenth.—There was evidence sufficient to warrant the justice before whom this action was tried, to leave it to the jury to say whether they were satisfied or could reasonably infer from the evidence that there was an agreement, express or implied, between the plaintiff and the defendants, by which the relation of landlord and tenant existed between them in respect to the premises.

1. The justice was therefore right when the plaintiff rested, in refusing to dismiss the complaint, on the grounds presented by the defendants.

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2. He was also right in submitting it to the jury to say whether such an agreement existed.

The first and second grounds upon which the defendants founded their appeal to the court of common pleas for the city and county of New York, are sufficiently shown to be untenable in the above points, and from the facts of the case.

For answer to the defendants' third ground, that they never were, in any sense, tenants of the plaintiff, the court is referred to the defendants' own declarations, where they urge it as a reason why they should have the premises for another year, that "they were among the Doctor's best tenants, and had always paid punctually," and to the fact that "on two occasions during the period the defendants occupied the store, they offered notes for the rent."

The defendants' fourth ground, that they were the tenants of E. & A. Ingraham & Co., is, unfortunately for them, not sustained by any evidence whatever, and was contrary to their sworn answer, in which they state that they hired, used and occupied the premises as tenants of Elias Ingraham, Andrew Ingraham, Edward Ingraham, and Edmund C. Stedman. There was nothing to prevent the defendants from taking the stand and proving by their own oaths, if the facts were not as sworn to by the witness Jackson.

The defendants were estopped by their own acts and declarations, from setting up the title of E. & A. Ingraham & Co. to the premises, as they did for a fifth ground. Where a person admits that he is the tenant of A, he cannot afterwards allege title in B of the premises he occupies to defeat A's claim for rent. This is the general rule and well settled (8 *New Hampshire Rep.*, 25. and cases there cited).

The defendants' sixth ground, that they never attorned to or acted as tenants of the plaintiff, is directly at variance with the evidence.

To the seventh ground, that the court below erred in

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submitting to the jury, as a question of fact, the proposition at folio 29, which there was no evidence to sustain, we answer, that the case shows evidence of an agreement and going into possession, and paying rent under it, and certainly enough for the jury to infer "use and occupation" by the defendants, and which, on the authority of the cases cited (1 *Carrington & Kirwin*, 14, and *Glover agt. Wilson*, 2 *Barb.*, 264), were proper questions for the jury, and were rightly submitted. We also rely on the opinion of Judge DALY to the same effect.

To the eighth and last ground of the defendants, that the court below erred in permitting the witness to testify as to facts not within his knowledge, we say that the court could not know how the witness would testify, or what facts were within his knowledge; and besides, his answer could not injuriously affect the defendants after what he had before testified, that "on two occasions during the period the defendants occupied the store, they offered notes for the rent."

DALY, F. J. The action was for use and occupation; the plaintiff averring that the defendants occupied the premises as his tenants, and the defendants averring that they hired and occupied them as tenants of E. & A. Ingraham & Co. Upon the trial it was shown that the plaintiff demised the premises by a written lease to E. & A. Ingraham & Co., for two years and nine months, from 17th August, 1855, and a series of receipts were produced signed by the plaintiff's agent, acknowledging the receipt of rent from the defendants for the account of E. & A. Ingraham & Co., extending from the 17th May, 1856, to the 27th March, 1858. The action was for the quarter's rent from 17th February, to the 17th May, 1858. The plaintiff having heard that E. & A. Ingraham & Co. had failed, went to the premises and saw the defendants, who told him that he need not fear or be concerned about the rent; that they

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intended to occupy the store for the same business. When this interview took place did not appear, but the defendants continued to occupy the premises thereafter and paid the rent; the receipt for the rent being written according to their dictation. In March, 1858, the plaintiff's agent had a conversation with them about hiring the premises for a year after the 17th of May, 1858, when they said that they ought to have them for the following year, as they were among the plaintiff's best tenants, and had always paid punctually.

When the rent was demanded for the last quarter, the defendants said that they had paid money enough on account of E. & A. Ingraham & Co., and should pay no more; that E. & A. Ingraham & Co. owed them largely to the commencement of the last quarter, the plaintiff receiving the rent from them each quarter; that the defendants were liable to plaintiff for the last quarter's rent. To which instruction the defendants excepted, and the jury found for the plaintiff. The defendants also asked for a dismissal of the complaint, upon the ground that there was nothing in the case from which the relation of landlord and tenant, or any contract between the plaintiff and defendants could be inferred; that the presumption arising from occupation was rebutted by the proof of hiring, which application was denied.

There was sufficient in the case to submit to the jury the question whether the occupation of the premises by the defendants was under an agreement made by them with the plaintiff, and though that question was not put to the jury as clearly or as intelligently as it might have been, yet it is apparent, from the language used by the judge, that he meant to, and did in effect, leave that question to them.

All that was offered with a view of showing that the defendants occupied as under tenants of E. & A. Ingraham & Co., after the failure of that firm, were the receipts given by the plaintiff's agent, under the defendants' dictation,

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acknowledging the receipt of rent for account of E. & A. Ingraham & Co. This was a circumstance, but not a controlling one. It was to be weighed as against the other evidence, and left to the jury for them to determine what conclusion was to be arrived at from the whole of the evidence taken together, and a question of fact, which upon such evidence might have been determined either way, was one in respect to which the finding of a jury is conclusive. The fact that the defendants succeeded to the business of E. & A. Ingraham & Co., or carried on a similar business in the same premises after the failure of that firm; that at the outset of their occupation, or when the plaintiff was first advised that they meant so to occupy and carry on the same business; that they gave him their assurance that he need feel no concern about his rent; the fact that they paid their rent not to E. & A. Ingraham & Co., but to the plaintiff, as long as they continued to pay it, and that they wanted to hire the store for another year, urging as a reason to induce the plaintiff to let it to them, that they were among his best tenants, and had always paid their rent punctually, were circumstances sufficient to support a finding by the jury that they held under a distinct and independent agreement with the plaintiff, and not as tenants under a demise from E. & A. Ingraham & Co., notwithstanding the form in which the receipts were drawn.

The lease to E. & A. Ingraham & Co., embraced the period during which the defendants occupied, and where a lease is outstanding, and a party other than the lessee is in possession, the presumption is that he is the assignee of the lease, which may be overcome, however, by showing that he holds under a demise from the lessee. (*Armstrong agt. Wheeler*, 9 Cowen, 88; *Williams agt. Woodward*, 2 Wend. 487; *Quackenboss agt. Clark*, 12 *id.* 555.) If the party in occupation must be regarded as the assignee of the lease, the landlord cannot sue him for use and occupation, as his liability to the landlord for the rent is founded upon privity

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of estate, and the action must be upon the lease (*McFarlan* agt. *Watson*, 3 *Comst.* 286). If there was nothing in the case but the occupation of the premises by the defendants, they might be regarded as assignees of the outstanding term demised by the plaintiff to E. & A. Ingraham & Co., and the plaintiff could not sustain the present action for use and occupation. But a surrender of the lease with the consent of the landlord before the expiration of the term, may be inferred from circumstances, and a lease by the landlord to a third party, with the consent of the former tenant, operates as a surrender of the previous lease, and estops the landlord from claiming any rent thereafter under that lease. (*Scheffelin* agt. *Carpenter*, 15 *Wend.* 400; *Smith* agt. *Niver*, 2 *Barb.* 180.) In this case there was evidence to warrant the conclusion of a change of tenancy with the consent of all parties, and the acceptance of the defendants by the plaintiff as original tenants, under an agreement by them to pay rent to plaintiff for the use and occupation of the premises, which, under the authorities, was sufficient to entitle him to maintain this action. (*Matthews* agt. *Sevall*, 8 *Taunt.* 270; *Drury Lane Company*, agt. *Chapman* 1 *Car. & Kirwin*, 74.)

The judgment should be affirmed.

BRADY, J. In this case the defendants claimed to be the tenants of E. & A. Ingraham & Co., but on the trial no evidence of such a selection was given, except the receipts taken by the defendants on the payment of rent to the agent of the plaintiff, and in which the amounts paid were stated to be received for account of E. & A. Ingraham & Co. Why the moneys were paid by the defendants does not appear; whether as agents, attorneys in fact, or as assignees of the term, is not shown. The chief feature of the defendants' defence is for this reason wanting. The receipts for the reasons stated are vague and unsatisfactory, and would not justify the inference that the money paid was paid by the defendants as under tenants, more particularly

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when they said after the failure of E. & A. Ingraham & Co., that they intended to occupy the store for the same business carried on by that firm. In the absence of this proof there is no evidence showing that the defendants are liable to E. & A. Ingraham & Co., under any hiring from them; a legal conclusion, which, if it existed, would, in my opinion, require in this case the application of other legal principles than those upon which it must be decided. The plaintiff finding the defendants in possession, as detailed by the witness Jackson, and governed by the details of the interview which then took place, with the other circumstances developed, I think the hiring from or occupation under the plaintiff was a question of fact, which could be submitted with propriety to the jury, as was done here. I do not design to add anything on this branch of the case to the views expressed by Judge DALY, in which I concur.

I think the judgment should be affirmed.

MULLIN, J. The defendants must have occupied the premises in question, either as sub-lessees of Ingraham & Co., as their assignee of the term, or as the tenant of the plaintiff, and if they are liable for the rent to the plaintiff, in either of these characters this judgment appealed from should be affirmed. 1st. Were the defendants under-tenants of Ingraham & Co.? No agreement to underlet is proved, nor is there any fact proved from which an underletting could fairly be inferred. It was a ground of forfeiture of the term, if Ingraham & Co. let or underlet without the written consent of the plaintiff, and no such consent is pretended. It cannot be presumed that the defendants and Ingraham & Co. designed to make a transfer of the lease, or of the term, in a way which *eo instanti* forfeited it, if there was any other mode in which defendants could obtain the possession that would not produce such a result. If we are permitted to indulge in presumption, then the presumption upon the facts proved would be that the transfer to defendants was by assignment and not

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by underletting. The defendants held for the whole residue of the unexpired term of the lease, commencing in February, 1855. When the transfer is of the whole of a term, the person taking is an assignee and not an under-tenant, although there is, in form, an underletting. It is essential to an under-tenancy that it be of a part only of the unexpired term. In *Woodfall's Landlord and Tenant*, 345, it is said "an assignment, as contradistinguished from an under-lease, signifies a parting with the whole term." Again, at page 358, of the same author, it is said an under-lease of the whole term amounts to an assignment. In 1 *Hilliard's Abridgment*, 126, § 55, it is said "the ordinary distinction between an assignment and an under-lease is, that the former transfers the land for the whole term, the latter for only part of it." In the absence of any evidence of the bargain under which defendants entered into possession, and it being shown that they occupied the whole of the unexpired term of the lease to Ingraham & Co., the fair presumption is, that they entered for the whole of such unexpired term, and as such interest is given, not by an under-lease, but by an assignment, the presumption must be that the defendants were in as assignees and not as under-tenants. But if they were in as under-tenants they would not be liable to the plaintiff for the rent, either in an action on the lease or for use and occupation. (*Woodfall's L. & T.*, 358; *Chitty's Pl.*, 36; *Taylor's L. & T.*, § 448.)

2. Were the defendants assignees of the lease? The defendants were in possession, having the lease from the plaintiff to Ingraham & Co. in their hands, and they paid the rent to the plaintiff upon that lease for the benefit of Ingraham & Co. When to these considerations are added the reasons assigned under the foregoing proposition why the defendants were assignees and not under-tenants, the conclusion would seem to follow that defendants were assignees of the term. They entered by consent of the lessees; they occupied for the whole residue of the term,

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and there is no evidence of a holding in any other character. Under these circumstances the law presumes the defendants in as assignees of the lease. (4 *Hill*, 112; *Taylor's L. & T.*, § 429.) In *Quackenbush agt. Clarke* (12 *Wend.* 555), Clarke sued Quackenbush for rent, as assignee of a lease given by him to one Washington. The defendant denied the assignment, and on the trial it was shown that the lessee had sold his interest to one Hardy, but did not execute an assignment to him; that Hardy sold his interest to the defendant, delivered to him the lease, but did not execute an assignment. There was a verdict for plaintiff, and defendant brought error. SAVAGE, Ch. J., delivering the judgment of the court, says: "The fact of possession is sufficient evidence of an assignment in the first instance. The fact of an assignment is a transaction between the defendant and the lessee, of which the plaintiff is not cognizant, but the defendant is. There is no hardship, therefore, in concluding him by his possession, unless he discloses the true state of his title." The same was held in *Armstrong agt. Wheeler* (9 *Cowen*, 88), and in *Williams agt. Woodward* (2 *Wend.*, 487), and these cases rest on 2 *Phillips' Ev.*, 150; 3 *Bos. & Pul.*, 461. In 2 *Phil. Ev.*, 150, the doctrine is stated more fully. The learned author says: "When the action is brought against the defendant as assignee of the term, and the issue is on the assignment, it will be enough for the plaintiff to give general evidence from which an assignment may be inferred, as that the defendant is in possession of the demised premises or has paid rent." Payment of rent by the defendant to the plaintiff, when the defendant has been let into possession by the original lessee, is *prima facie* evidence of the assignment of the whole term. The defendant who is charged as assignee of a term, is at liberty, in an issue on the assignment, to show that he holds the premises as under-tenant to the lessee and not as assignee. Every fact was proved in this case required to establish an assignment

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to defendants of the term, and they gave no evidence to rebut or overcome the *prima facie* case thus made against them. Under the statute of frauds the assignment of a lease must be in writing or it is void. If there was in fact no assignment in this case, the defendants could not be made liable, but as the law infers an assignment from certain facts proved, the inference must be of a valid operative assignment, such an one as was sufficient to transfer the term. It was incumbent on the defendants to prove, either that there was no assignment or that it was one void in law. Instead of making such proof, they have satisfied themselves with the case as made by the plaintiff, and as that case fixes their liability, they should not complain. The defendants being assignees, they were liable on the lease for the rent. The covenant to pay rent runs with the land and binds the assignee, even though he is not named in it. (*Jacques agt. Short*, 20 Barb., 269; 23 Wend., 506; 3 Den., 284; *Woodfall's Landlord and Tenant*, 278.) It seems to me, therefore, the defendants must be deemed assignees of the lease and liable as such. The pleadings are not framed to charge defendants in that character. The complaint claimed to recover for use and occupation, disregarding altogether the lease to Ingraham & Co., and a transfer thereof to the defendants. When the whole evidence was out, it was established that the plaintiff could not recover for use and occupation. He must recover, if at all, upon the covenants in the lease, and the question now is, was the court at liberty, on the trial, to amend the complaint so as to conform it to the proof, or was there such a failure of proof as defeated altogether a recovery? To permit a recovery in this case, is to carry the right of amendment as far, it seems to me, as it is possible to carry it, and not overlook altogether the great end and aim of all pleading, which is to inform the opposite party of the cause of action or defence which he is called upon to meet. The courts have been very liberal in giving effect to the

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provision of the Code that permits variances to be disregarded, and amendments to be made conforming pleadings to proofs. In *Robinson agt. Wheeler* (25 N. Y. R., 252), the complaint charged that defendant had set fire to and destroyed a woodshed on premises of which he owned the reversion. On the trial it was proved that the building was destroyed by the negligence of the defendant; the plaintiff was permitted to recover. In *Byzbie agt. Wood* (24 N. Y. R., 607), the plaintiff claimed to recover for money obtained from him by fraud. The fraud was not found by the referees, yet the plaintiff was held entitled to recover. In *Harpending agt. Shoemaker* (37 Barb., 270), the action was for money had and received, &c.; on the trial plaintiff offered to prove that defendant had unlawfully taken and converted his property, sold it and received the avails; the evidence was held competent; the plaintiff was permitted to recover. In all these cases the plaintiff was permitted to recover on a case essentially different in its facts from that stated in the complaint, and it seems to me it would be giving effect only to the principle on which these cases were decided, to hold that the plaintiff in this case was entitled to recover the quarter's rent due on the lease, notwithstanding the action is for the value of the use and occupation. Aside from the principle on which such a recovery may be supported, the circumstances of the case justify the court in permitting the plaintiff to take judgment for the rent. 1. The amount claimed and recovered is the rent due by virtue of the lease. 2. The plaintiff, on the proof given by him, insisted he was entitled to recover for use and occupation, and it was the defendants proof of the lease that produced the difficulty in the case, even the grounds of this defence are not set out in the pleadings. He was not surprised. He held in his own hands the evidence which defeated an action for use and occupation, and which authorized a recovery on the lease. While I entertain serious doubts whether principles on

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which the right of recovery in this case must rest, will not be the source of trouble in trials at the circuit, yet I do not think it is carrying the right of amendment further than has been done in the cases cited. I am, therefore, in favor of affirming the judgment as a recovery on the lease, it not being suggested that the defendants were surprised. 3d. Were the defendants tenants of the plaintiff, and as such, liable for use and occupation? A lease which had two years from the entry of the defendants, being proved, it was incumbent on the plaintiff to prove its surrender so that he was at liberty to relet the premises, and if a surrender in law is proved, the defendants are liable for the rent. A surrender is defined to be the resignation of a particular estate for life or for years to one in the immediate reversion or remainder (*Comyn's Dig. Title, Surrender A*). The surrender may be made by deed, conveyance in writing, or by act or operation of law (3 R. S. 220, § 6). If there is a surrender in this case, it is by act or operation of law, there being no deed or conveyance in writing shown or pretended. There is a surrender by act or operation of law, when the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing; a term created which would not be valid if his particular estate had continued. (*Springstein agt. Schemerhorn*, 12 J. R. 357; *Van Rensselaer agt. Peniman*, 6 Wend. 569; *Livingston agt. Potts*, 16 J. R. 28.)

In order that the second lease may operate as a surrender of the first, it is essential that the lease be a valid one. It was held in *Schieffelin agt. Carpenter* (15 Wend. 400), that a parol lease for more than a year to a third person, though he takes possession, will not operate as a surrender. The same rule was applied in *Whiting agt. Myers* (1 Duer, 266). It is not necessary that the second lease should be to the first lessee. If given to a third person by the consent of the first lessee, it operates as a surrender. In *Nicholls agt. Atchison* (24 Eng. C. L. 228), it was held that a landlord

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could not recover rent of his tenant when the latter had abandoned the premises during the term, and the landlord had let them to another, not for the benefit of the original lessee. The acts of the parties were treated as a rescission of the agreement, and to have dispensed with a surrender. (*See same case in 12 Eng. C. L. 565.*) In *Nicholls agt. Atchison* (59 *Eng. C. L.* 943), the plaintiff had let the premises to defendant for three years. At the end of the first year defendant quit, and wrote a letter to the plaintiff, in which he requested him to let the premises to some other person. Plaintiff did let them to another for three years, and the new tenant entered and paid two quarters rent, and became insolvent. The action was brought for the balance of the rent due by virtue of the lease to defendant, after applying the amount paid by the new tenant. The question was submitted to the jury whether the plaintiff had accepted the new tenant in substitution and discharge of the defendant. The jury so found. The judge instructed them that if they so found, the verdict should be for the defendant. The plaintiff had leave to move for leave to enter a verdict for himself, and a rule nisi having been obtained, the court held that there was a surrender of the old lease by operation of law. In *Smith agt. Niver* (2 *Barb.* 180), it was by HARRIS, J., held, that when a landlord has consented to a change of tenancy, and has permitted a change of occupancy, and received rent from the new tenant as an original and not a sub-tenant, he cannot afterwards charge the original tenant for rent accruing during the occupation of the new tenant. I have referred to these cases, because they are the most favorable of any I can find to the plaintiff, and yet they do not go far enough to sustain this action against the defendants, as holding directly from the plaintiff. It will be seen, that in all of the cases, a mutual agreement between the lessor and original lessee, that the lease terminates, must be shown. It is not necessary that the agreement should be express,

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it may be inferred from the conduct of the parties. The occupancy by some other than the lessee is of course a circumstance to show a surrender, but as the new occupant may enter as the tenant of the lessee, or as his assignee, or even as a trespasser, and thus his occupancy be consistent with the first lease, it is absolutely essential that it should be clearly proved that the original lessee assented to the termination of his term. In short, it must be proved that the lessor and lessee mutually agree to a surrender of the term, and that proved, the original tenant is no longer liable—but the new tenant (if there is one) is liable. What evidence is there in this case of an assent by Ingraham & Co. to a surrender of their lease? No witness has testified directly to any such fact. It does not appear they and the plaintiff ever spoke together upon the subject. The fact that defendants held their counterpart of the lease; that they (Ingraham & Co.) quit possession, and that defendants entered, occupied and paid rent, and even claimed to be tenants, is entirely consistent with a continuance of the original lease, and occupancy by defendants as under-tenants or assignees of the lessees. There is not a particle of proof that Ingraham & Co. have ever consented to a letting by plaintiff to defendants, or even that they knew that any such thing was contemplated. For aught that appears in the case, the defendants are liable to Ingraham & Co. for the rent of the premises during the whole period they were in possession. In *Drury Lane Co. agt. Chapman* (1 *Car. & Kir.* 14), it appeared that the plaintiffs had rented certain counters in the theatre to Mrs. Chapman, mother of defendant, for seven years. She entered and occupied less than a year and died. The defendant applied to plaintiffs to take him as their tenant, and they accepted, and he entered and paid rent for a part of the term. The plaintiffs sued him to recover for the use and occupation of the premises. The defendant put in evidence the lease to his mother, and letters on her estate to another son. The

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court put it to the jury to say whether the defendant entered under a new contract with the plaintiff for the use of the premises, or whether he entered under the lease to his mother. The jury found he entered under a new agreement, and there was a verdict for the plaintiff. The court refused a rule to show cause why there should not be a new trial. If this case was rightly decided, it follows that it is wholly immaterial whether there is an outstanding lease when the new agreement is made. It is enough if the plaintiff is able to prove the new agreement—the defendant is then estopped from disputing his title. In the case cited, it is obvious that by the death of Mrs. Chapman, her lease was not annulled. It passed to her representatives, who were entitled to the use and occupation of the premises, and the defendant was in law liable to them. In *Doe agt. Wood* (14 *More*, 2 G. 681), H. had leased certain premises of Lady H., and died, leaving a widow. She continued to occupy and pay rent to Lady H. J. H. took out letters of administration on H.'s estate, and after such letters taken, the widow, with the knowledge of the administrator, occupied and paid rent to Lady H., and he never objected to such payment, or made demand for the rent. The administrator brought ejectment against the widow and her second husband, and it was held that there was no evidence of surrender by operation of law, so as to create the relation of landlord and tenant between Lady H. and the widow, and the plaintiff recovered. These two cases cannot stand together. The first is in utter disregard of the well settled rule that the lessor cannot recover against a third person for the use and occupation of premises unless he shows a surrender of the original lease. In the case last cited, it is quite clear that there ought not to have been a recovery, if the widow was the tenant of Lady H. There may be a recovery by the original lessor against a third person, who enters during the running of a lease, under an express agreement with such lessor for the

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occupancy, when the entry is under such contract exclusively, and has no connection whatever with the original lessee, who has omitted to assert any claim to the premises, or for the rent thereof. In such case the new tenant may properly be held estopped from disputing the title of his lessor (*Phipps* agt. *Scherlthorp* (1 *Barn. & Ald.* 50). But in this case the tenant insists that he entered under Ingraham & Co., and shows the lease, and proves payment of rent by him on the original lease, for the benefit of the original lessees.

Believing the defendants are liable as assignees of the term for the rent claimed, I am in favor of affirming the judgment with costs.

CITY COURT OF BROOKLYN.

MARIA F. DEVIN, GEORGE L. PATCHEN, SAMUEL W. PATCHEN
AND JOSEPH A. PATCHEN, agt. WILLIAM DOUGHERTY.

A tenant of a store or shop for a term of years, who erects a wooden shed or awning over the sidewalk in front of and adjoining the building, the full width of the sidewalk, for the convenience of his business, has the right, as the owner of such woodshed or awning, to remove it from the demised premises at the expiration of his term.

The fact that the tenant built the woodshed or awning during his first term, and that he took subsequently a renewal of the lease for another term, without any reservation of such fixture, did not affect his rights as the owner thereof.

Brooklyn, September, 1864.

THIS action is to restrain outgoing tenant from waste in removing a shed affixed to a house in Brooklyn.

The complaint stated substantially that plaintiffs own premises in the city of Brooklyn, corner of Court and Atlantic streets, on which is a two-story wooden building, "and also the public streets lying in front of said demised premises to the centre lines thereof, subject only to the public easement therein."

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That about May 1st, 1852, a lease dated April 5th, 1851, was made to defendant for nine years from May 1st, 1855, under which defendant holds the premises. That prior to and at the time of the making and delivery of said lease, there was connected with said demised premises a wooden shed used for the purposes of an awning or shade to the building on said premises, projecting over the sidewalk adjacent to the said building, the existence of which is, for many purposes to which the premises are adapted, exceedingly beneficial to the tenant or occupant thereof, and that there has been continually, and still is, such a shed connected with and beneficial to said premises; that defendant threatens to tear down and remove the materials of said shed, whereby the value of the premises will be diminished; that defendant is insolvent—prayer for injunction.

The answer was, in substance, that a lease was made to defendant April 13, 1846, for nine years from May 1, 1846; that after the execution of first lease, defendant placed the shed upon the premises for his own use and for the convenience of his business, and at his expense; that the same was so placed there that it could be, and it was intended to be removed, unless the tenant who succeeded him purchased it, which is the same grievance complained of.

The cause was tried before Judge REYNOLDS, June 30th, 1864.

Mr. Gill, for plaintiff, moved for judgment, because the complaint was not denied, and the facts alleged in the answer made no defence. On the contrary, the allegation that the defendant entered into the premises and made the shed under a prior lease, and continued under the lease stated in the complaint, is frivolous (*see Taylor's Landlord & Tenant*, 2d ed. § 552, and cases cited).

The court reserved decision.

Mr. Barnard, for the defendant, then offered in evidence

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the leases referred to in the pleadings. The plaintiffs' counsel objected to any evidence as immaterial (overruled).

William Dougherty, the defendant, was offered as a witness in his own behalf. The plaintiffs' counsel objected to his testimony, and to his being sworn or examined as a witness, because the relief sought for was merely injunction, to which the plaintiff was entitled under the pleadings, and no evidence could be taken or had inconsistent with the pleadings, any evidence in accordance was immaterial and irrelevant.

The judge overruled the objection, and decided to hear the witness, subject to the plaintiffs' exception.

The defendant then testified, that he was a butcher and carried on business on the premises from the commencement of the first lease until the end of the second; that the shed which was there last April was thirty-eight feet on Court street and twenty-one on Atlantic, extending from the house over the sidewalk to the curbstone, and took in the circle of the course; I put it up at my own expense to keep the sun off my vegetables and fishstand, for my own benefit and business.

Q. When did you put it up?

A. I put the last which was there in August, 1858; I had put a shed there before that which I had taken down.

The plaintiffs' counsel, at the close of the evidence, renewed his motion for judgment, on the ground that this evidence was inadmissible under the complaint and answer; that the testimony of the witness, as last stated, was not within the scope of the answer, and was not admissible; that the question under which it was evolved, did not anticipate such answer, and therefore it could be considered as given without objection.

The judge took the case for consideration.

WILLIAM L. GILL, for plaintiff, made the following points :

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I. The answer does not deny any facts stated in complaint.

II. The answer sets up new matter, which not only is no defence, but shows the defendant can have no defence.

III. The answer showing a previous lease under which the shed was erected, and the renewed possession under the new lease, admitted an abandonment of any right to remove the shed (*Taylor's Land. & Tenant*, § 552, 2d ed. and cases cited).

IV. The defendant cannot be allowed to give evidence disproving his answer and at variance with the pleadings as admitted.

V. The evidence of defendant should be stricken out.

VI. The shed was not subject to removal.

The latest decisions have stopped short of the former rulings. (*See 19 N. Y. Rep. 240 ; 5 Duer, 389.*)

D. P. BARNARD, *for defendant, made the following points:*

I. The facts as proved in this case are, that on the 13th April, 1846, Henry Patchen leased to the defendant, the premises on the corner of Court and Atlantic streets, Brooklyn, for the term of nine years from May 1st, 1846. The defendant put a wooden shed or awning over the sidewalk on Court street and Atlantic street, in front of and adjoining the building, the full width of the sidewalk, for the convenience of his business as a seller of meats, fish and vegetables. Henry Patchen having died, his executors gave the defendant a further lease of the premises dated April 5, 1851, for nine years, from May 1st, 1855. In 1858, the first shed or awning erected by the defendant not suiting him, he erected another for the like convenience of his business, which was standing at the time this action was commenced, April 26, 1864, and as defendant was enjoined in this action from removing it, it continued on the premises after the expiration of his term. It is a wooden shed,

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thirty-eight feet long on Court street, twenty-one feet long on Atlantic street, and covers the whole sidewalk, including the circle of the corner. The shed is formed by a piece of timber nailed to the house, then rafters fitted into or laid upon the timber, and boards covered over the rafters. On the outside, at the curb-stones, the shed rested on some seven or eight posts set in the ground three or four feet deep.

II. The defendant claims that said shed was his property, and that he had a right to remove it from the premises while his possession continued.

III. The rule in 2 R. S., 83, section 7, defines personal property to be "things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of the house so as to be essential to its support."

IV. *Reynolds* agt. *Shuler* (5 Cowen, 323), copper stills or kettles, steam tubs, coolers, and a worm placed in a stone distillery for the purpose of carrying on the distilling business, affixed to the building, the kettles or boilers being masoned up in brick arches, and the steam tubs and coolers, with the worm, were all connected with the boilers by logs and braces affixed to the building. The kettles and other articles were taken out by breaking up the arches. Held to be the property of the tenant.

V. *Raymond* agt. *White* (7 Cowen, 319), a cylindrical heater placed on the premises by a tenant, to be used for applying heat to tanner's bark in vats and leaches, detached from the building, except that a small piece of board was tacked with nails to the vat and to the side of the building, but there was no necessity for fastening the vat, and the fastening mentioned was of no use except to keep the side standing while the vat was put together. Held personal property.

VI. *Cook* agt. *The Champlain Transportation Co.* (1 Denio, 91). The engines and machinery in a mill, though firmly

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affixed to the building, yet having been so affixed for the purpose of carrying on a business of a personal nature, are still the personal property of the tenants, and as such removable at their will.

VII. *Lawrence agt. Kemp* (1 *Duer*, 363), decided that "gas fixtures" and "stools" placed in a building by a tenant are his property. If not removed during the term, they do not for that reason cease to be his property. He may remove them after his term expires, without subjecting himself to any damages for such removal, even though he be liable to an action of trespass for an entry on the demised premises.

VIII. *Holmes agt. Tremper* (20 *J. R.* 29). The tenant erected a cider mill, which was standing upon and annexed to and parcel of the farm. Held to be personal property, whether the mill was let into the ground or not. Though removed after the end of the term, the mill belonged to the tenant, and leaving it there could not work any change of the property.

IX. *DuBois agt. Kelly* (10 *Barb.* 496). A lease expired March 1, 1848. The tenant held over, and on 31st March, 1848, removed a barn and shed erected by a tenant of the lease.

Held that the tenant has the right to remove his additions and improvements at any time before his right of enjoyment expires.

On pages 509 and 510, the court considers the question and refer to a number of cases to show "that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises, under a right still to consider himself as tenant."

X. *Ombony agt. Jones* (19 *N. Y. R.* 234). The court on page 239 say, "another qualification rests more distinctly upon authority, to wit: That the right of removal is not lost

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so long as the tenant continues to occupy, although his term has expired."

REYNOLDS, J. The testimony in this case shows that the shed in question was erected by the defendant as tenant, for the purposes of his trade during the term which expired May 1st, 1864. It was, substantially, a wooden awning in front of the building which stood upon the demised premises, and might be removed without materially affecting such building. But the natural interpretation of the answer is, that the shed was erected during a former term which expired May 1st, 1855, and as the defendant upon the trial elected to stand upon the answer as it is, instead of submitting to terms for an amendment, the question presented is whether a tenant, who erects a structure which he might remove during his term, or at the expiration thereof, loses such right of removal by taking during his original term a new lease which contains no provision as to the erection already made, and continuing in possession under such new lease.

As the new lease was intended merely to provide for a further occupancy of the premises, and that for the same purposes, I see not why it was necessary for the tenant to reserve in it any rights in regard to a thing which was his, and which it must have been understood he was to continue to use as his own during his new term. He hired for a second time his landlord's premises; but how can that be said to be also a hiring of property, upon these premises, which belonged to himself, and which, as yet, he had a right to use upon those premises under a lease still in force? What need was there of any agreement as to what he then had a right to remove, and an equal right to continue to use upon the premises as long as he secured the right to the occupancy of such premises?

To hold that the acceptance of the second lease by the tenant implies the surrender of his claim to property stand-

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ing upon the premises, so that he cannot remove it now, would be to hold that after such lease he could not have removed it even during the first term, a position which I think cannot be successfully maintained. It will be observed that in this case there is no presumption of the abandonment of fixtures, as in the case of a tenant quitting the premises, leaving the fixtures behind him. My conclusion is that the defendant had a right to remove the shed in question at the expiration of his last term, and that this action cannot therefore be maintained. The complaint must be dismissed with costs.

SUPREME COURT.

THE PEOPLE *ex rel.* MARY A. McHUGH agt. THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK.

The Board of Education of the city of New York, under the statute, (1851) have no appellate jurisdiction over the Trustees of Common Schools of that city, in the exercise of their powers to dismiss teachers, and other officers of the ward schools, and the ward primaries.

New York General Term, June, 1864.

Before LEONARD, CLERKE and BARNARD, Justices.

THE relator was employed by the board of school trustees of the sixth ward, as a teacher in one of their grammar schools, on the 23d day of July, 1856, at a salary of \$400 per annum.

She continued in such capacity until subsequent to the 24th day of June, 1861, when she received a notice that her services were no longer required, but no cause was therein expressed for her dismissal.

Her dismissal was filed in the clerk's office of the board of education on the 29th June, 1861.

Within twenty days (*i. e.* July 17th, 1861,) relator filed

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with said clerk notice of her appeal from the action of the trustees, to the board of education.

On the 20th November, 1861, the board of education, by a vote of 23 to 4, reversed the proceedings of the trustees and ordered the relator to be restored to her position with pay from 24th June, 1861, as if no dismissal had taken place.

The school trustees have ever since refused to recognize the act of the board of education or to insert relator's name in the pay rolls so that she could obtain the salary; and the board of education have laid on the table reports of their finance committee in her favor.

Application was made at a special term for a *mandamus* to compel the board of education (the disbursing power) to pay her arrears of salary and to compel the trustees to reinstate her.

The application was denied by Mr. Justice SUTHERLAND, and the relator appeals.

WILLIAM R. STAFFORD, *for relator.*

I. The board of school trustees only has the power, "under such general rules and regulations as the board of education may adopt," to contract with and employ teachers and make other contracts for conducting and managing their schools. They have no power summarily to terminate those contracts at their own election. (*School Law of N. Y.* § 10, *sub. 2*; 1 *Revised Statutes*, 4th ed., 917, § 203, *sub. 2*.)

The city superintendent examines, "under such general rules and regulations as the board of education may establish," into the qualifications of teachers (*School Law*, § 11, *sub. 2*); and teachers must be licensed in their respective wards by him before they can act (§ 9, *sub. 2*).

The teacher thus qualified, when appointed, is governed as much by the by-laws of the board of education as are

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the trustees, and has a right to look to them for protection against violations of the contract by the trustees.

II. The board of education is the supervisory power, and the trustees acting as its agents, merely for the purposes prescribed in the act, are bound to proceed under the rules laid down by that governing and superior power. The trustees of 1861 were bound by the by-laws of 1860, so long as they continued in force. They had no right to make, nor had they in fact, made laws of their own, and in the absence of any on their part the rule of the board of education that, "upon the dismissal of a teacher the board of trustees shall file with the clerk of the board a copy of the resolution and notify the teacher of the cause of dismissal, and the teacher shall then have the right to appeal &c.," bound them. This was "a general rule and regulation," and all the teachers of 1861 were, for that year, employed under it and are entitled to its privileges. It became a part of the contract between teachers and trustees for that year.

III. The validity of the by-law was recognized by the trustees by their filing with the clerk of the board their resolution dismissing the relator in conformity with it (*vide deft's aff'ts*).

IV. No cause was assigned for that dismissal (*vide notice sent relator marked A*), nor was any hearing afforded her as claimed at folio 12 (*see folio 38*).

She did appeal within the 20 days (the resolution to remove being filed June 29th, and her appeal on the 17th July), and the board of education after hearing the trustees reversed their proceedings and restored her.

The trustees cannot now contumaciously deny the power of the superior tribunal or contend that the appeal was irregular or too late after submitting to a hearing of it on the merits before the appellate court.

V. The board of education not being the immediate contracting power could not be subjected to an action at

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law for breach of contract in refusing to allow performance by the relator.

Having, however, recognized the justice of her claim there was no necessity of a suit against them, they are estopped when we ask payment up to the time of their restoration of the relator in conformity with their own decision. The claim is clear and undisputed, and even if the relator had another remedy a mandamus would lie against the board of education to compel them to pay up to the time of their restoration. (*McCullough agt. The Mayor of Brooklyn*, 23 *Wend.* 458; *The People agt. Steele*, 2 *Barbour*, 397; *Aspinwall agt. Supervisors of Richmond*, 20 *New York*, 252.

VI. The board of trustees are not a corporation, nor could any suit be maintained against them as such. The only remedy is by mandamus to induct the relator into her office, to audit her claim for salary, and to insert her name on their pay rolls.

The state makes it their duty (*section 20 of School Act*) to certify all expenses to the inspectors, the inspectors to the board of education, whose clerk's duty it is to audit and pay them (§ 31, of *Article 6, of By-laws*, 1 *R. S.* 943, § 222).

A mandamus lies to compel them to proceed and audit. (*The People agt. Supervisors*, 22 *Howard* 71; *affirming* 21 *Howard* 322; *People agt. Supervisors of Cortland*, 24 *Howard* 119).

VII. The mandamus to restore should have been granted, the facts justifying the exclusion, not being clearly made out.

The *onus* is with the respondents. The relator was duly appointed and acting. She was informed that her services were no longer required, without knowing the reason, until a resolution stigmatizing her character was filed with the board whose superintendent has conferred on her authority to act.

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Upon an investigation by the proper tribunal that dismissal was held wrongful and unjust. The parties causing the wrong cannot arbitrarily refuse obedience but should be compelled to award justice (*Titus agt. Board of Police, 35 Barbour, 555*).

The order appealed from should, therefore, be reversed and a peremptory mandamus issued.

THOMAS BOESE, for board of education.

First preliminary point.—The principle is elementary "that where a party has a remedy by action a mandamus will not lie." (*Ex parte, The Fireman's Ins. Co., 6 Hill, 243; Matter of Shipley, 10 Johns. 484; The King agt. Bank of England, Douglass 524; Boyce agt. Russell, 2 Cow. 444; The People agt. Parker Vein Coal Co., 1 Abb. 128; The People agt. Sup. of Chenango, 1 Kern. 563; The People agt. Mayor, &c., N. Y., 25 Wend. 680; Ex parte, Lynch, 2 Hill, 45; The People agt. Thompson, 25 Barb. 73.*)

Second preliminary point.—Both the defendants are corporations capable of suing and being sued. (*Act relative to Com. Schools, § 2, sub. 11; Davies' Laws, p. 1045; also, § 10, sub. 5, Davies, p. 1051; Angell and Ames on Corp. § 2; Kyd on Corporations, 13.*)

Third preliminary point.—If the relator therefore has sustained damages by the illegal conduct of the defendant, she has a perfect remedy by an ordinary action.

First point on motion.—The relator is premature in applying for a mandamus.

(a) The names of teachers are inserted in the pay-rolls by the principals of the highest male school in the buildings in which the respective primary schools are situated (*see Brennan's afft.*).

(b) Until such a pay-roll is made out, neither of the defendants can act, and the relator can have no claim on

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them until these preliminary forms are complied with by her.

Second.—Before the relator can ask for a mandamus, she must have the title of the present incumbent of the situation in question regularly determined by a *quo warranto*. In such a case a mandamus will not lie by the party removed. (*Brennan's afft* ; *People ex rel. Hodgkin agt. Stevens*, 5 Hill, 616 ; *People agt. Corp. of New York*, 3 Johns. Cases, 79.)

Third.—The board of education have no power to pay a teacher unless her name is included in a pay-roll, properly certified and audited in due form. They pay the amount contained in the pay-rolls presented to them by the principals of the male schools, and have nothing to do with the teachers as individuals. (*Brennan's afft* ; see § 16 of act of 1851 ; *Davies' Laws*, pp. 1054, 1055.) No such pay-roll has ever been presented (*see affts*).

Fourth.—If, therefore, the relator has sustained any damage by the omission of her name from the pay-rolls made out by the "principal of the highest male school," she should apply for a mandamus against him, not against these defendants.

Fifth.—The name of another person is on the pay-rolls presented to the board of education, which are properly certified and audited. The board, therefore, is justified (under the act of 1851 and its by-laws), in paying, and does pay the present incumbent the salary of the office.

A. R. LAWRENCE, JR., for trustees of common schools 6th Ward.

First preliminary point.—If the relator has been illegally prevented from discharging the duties of first assistant teacher in the primary department of grammar school No. 23, by the trustees of the Sixth Ward, or if she has been illegally removed from the position of such teacher by the

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trustees of the Sixth Ward, she has a remedy by action against them for the damages sustained by her thereby.

Second preliminary point.—If the relator has been illegally refused the payment of the salary of such teacher by the board of education, she has also a right of action against said board for such salary.

Third preliminary point.—The familiar rule therefore applies, that where a party has a remedy by action, a mandamus will not lie. (*Ex parte The Firemens Ins. Co.* 6 Hill, 243; *Matter of Shipley*, 10 John. 484; *The King agt. Bank of England*, Douglass, 524; *Boyce agt. Russell*, 2 Cowen, 444; *The People agt. The Parker Vein Coal Co.* 1 Abb. 128; *The People agt. Supervisors of Chenango Co.* 1 Kern. 563; *The People agt. The Mayor, &c. of New York*, 25 Wend. 680; *Ex parte Lynch*, 2 Hill, 45; *The People agt. Thompson*, 25 Barb. 73.)

On this point it must be borne in mind that both the board of education and the trustees of common schools in each ward are corporations, and, therefore, capable of suing and being sued. (*See act relative to Common Schools*, § 2, sub. 11; *Davies' Laws*, p. 1045, and also § 10, sub. 5, *Davies*, p. 1051; *Angell & Ames on Corporations*, § 2; *Kyd on Corporations*, 13.)

First point on motion.—It is apparent that the relator did not comply with the provisions of the by-laws of the board of education, under which it is contended that a teacher has a right to appeal from the decision of the trustees of a ward dismissing or removing such teacher.

(a) The by-law in question provides, "that said teacher shall have the right to appeal to this board within twenty days after the service of notice" (*see Brennan's afft.*).

Now it distinctly appears from the affidavit of the relator herself, and from the affidavits of Brennan, that the relator received notice of her dismissal on the twenty-fourth day of June, 1861, and it also appears from the affidavit of Brennan, that the relator did not appeal to the board of

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education until the seventeenth day of July, 1861, or twenty-three days after she had received notice of her dismissal.

It is also worthy of notice upon this point, that Mr. Brennan is not contradicted upon the dates aforesaid.

We say, therefore, that the relator has not brought herself within the by-law in question, even if it be conceded that such by-law is valid.

Second.—In the next place, the respondents, the trustees of common schools for the Sixth Ward, deny that the said by-law of the board of education is of any validity whatever, or that the relator had any right to appeal to the said board of education from the action of said trustees dismissing her.

(a) The powers and duties of the trustees of common schools in the city of New York, in relation to teachers are defined in the act of 1851 (*Davies' Laws*, p. 1050).

The second subdivision of section ten of said act provides that it shall be "the duty of the trustees of each ward, and they shall have the power * * *. Second—Under such general rules and regulations as the board of education may adopt, to contract with and employ teachers and janitors in the said schools, and conduct and manage the same."

It is obvious from the phraseology of this subdivision, that the contracting and employing power is vested in the trustees.

The only qualification imposed on the unlimited exercise of such contracting and employing power, is that the contract or employment shall be "under such general rules and regulations as the board of education may adopt."

We say in reference to this qualification, that it only relates to the original contract with or employment of a teacher by the school trustees.

That is to say, the board of education may adopt a rule or regulation specifying what class, or kind, or grade of

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teachers shall be employed by the trustees in the first instance.

Thus they may prescribe that none but a teacher belonging to grade A, shall be employed in a particular department; or, none but a teacher possessing particular qualifications.

(b) But this qualification or proviso, does not give to the board of education power to interfere between the trustees and the teacher in a particular school, after such teacher has been appointed, and prevent the removal of such teacher, or reverse the proceeding of the trustees removing such teacher.

If this position is not correct, then the whole power of appointment, instead of being vested, as the statute says it shall be, in the trustees, passes from the trustees to the board of education; for whenever the trustees determine to remove an old teacher and appoint a new one, that is, contract with or employ a new one, the board of education under the by-law in question, may step in and say, "you shall not make such new contract or appointment."

In other words, the trustees instead of having a contracting or appointing power, become the mere registers of the will of the board of education.

(c) All the statute gives the board of education power to do, is to say how a teacher shall be contracted with or employed.

It has no power to say who shall be appointed, and consequently it has no power to say who shall be dismissed. The board has no power to say how a teacher when contracted with or employed shall be dismissed.

(d) The above construction of the statute is not only in harmony with its phraseology, but is also consonant with common sense.

The opposite construction will enable the board of education, who can know nothing of the qualifications, or capacity, or character of a particular teacher, in defiance

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of the will of the whole of the trustees of a ward, to keep a teacher in position, who is known by the trustees (who are thrown in daily contact with her) to be unfitted for her position, both as to capacity and character.

The construction for which we contend, makes the trustees of each ward subject to the board of education so far as the contract or employment in the first instance is concerned, but it leaves them free judges of the fact whether after the appointment of a teacher has been made, such teacher possesses the qualifications, or exhibits the traits which a teacher of children should possess or exhibit.

Third.—Even if the trustees are wrong in the position above taken, in reference to the power of the board of education to pass the by-law in question, the relator is not entitled to the remedy which she seeks, for the reason that her application is premature.

(a) It appears from the affidavit of the relator, that her name has not been placed upon the pay-rolls which are sent by the trustees of the Sixth Ward to the board of education, and on which payments are made for the salaries of teachers, by said board.

It also appears from the affidavit of Mr. Brennan, and from the by-law of the board of education annexed to said affidavit, that it is not the duty of the trustees to make out such pay-rolls, but that such duty is imposed upon the principal of the highest male school in the building in which the primary department referred to in the relator's affidavit is situated.

Until such a pay-roll is made out by said principal, it is not the duty of the trustees to certify said pay-rolls, or of the inspectors to audit; nor is it the duty of the board of education to pay any teacher any salary, until such pay-rolls duly made out, certified and audited, have been filed with the clerk of said board. (*See also* § 16, of *Act of 1857*; *Davies' Laws*, pp. 1054, 1055.)

(b) Now it distinctly appears that no pay-rolls made out

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by the principal of the highest male school in the building in which said school twenty-three is located, bearing the name of the said relator, has ever been presented to the trustees of the Sixth Ward for their certificate.

If then the relator has been aggrieved, it has not been by the action of the school trustees, but by the neglect of the principal of the highest male school in the building in which her department is situated.

Under the by-law in question, and under the act of 1851, the trustees and inspectors are neither bound to certify nor audit any pay-rolls which have not been made out as aforesaid. (*See by-law B, Brennan's affidavit, and Davies' Laws, p. 1048.*)

Fourth.—There is another person filling the office to which the relator claims to be entitled, and of which she demands the emoluments, and it is perfectly well settled that in such a case a mandamus will not lie in behalf of the party who claims to have been illegally removed. (*Brennan's affidavit; People ex rel. Hodgkins agt. Stevens, 5 Hill, 616; People agt. The Corporation of N. Y. 3 Johns. Cases, 79.*)

The proper remedy of the relator is by a *quo warranto* to try the title of Miss Dunn, the present incumbent. (*Cases supra; Crary on Special Proceedings, title, Mandamus.*)

Fifth.—Again, a mandamus will not be granted unless the relator has a clear legal right to the relief which she asks. (*People agt. Supervisors of Chenango Co. 1 Kern. 563; and see Beardsley's Points, where all the cases are collected.*)

Now in this case it cannot be pretended that the right of the relator is clear, and the case calls for the application of the above principle.

Sixth.—The order of the special term should be affirmed with costs.

By the court, CLERKE, J. The case arose upon the removal of the relator from the position of first assistant

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teacher of grammar school No. 23, by the local board of the Sixth Ward, for alleged misconduct. Miss McHugh appealed from the decision of the local board to the board of education, which body on December 2, 1861, reversed the action of the trustees, and directed the relator to be reinstated in her former position, which had been filled by the appointment of another person.

The local board refused compliance with this decision, claiming that the board of education had no jurisdiction over the appointment or removal of teachers, and, therefore, had no power to pass the by-law authorizing an appeal from the action of the board of trustees, and claiming further, that the appeal by the relator was not taken in proper form.

The relator applied for a mandamus against the school officers, to compel them to reinstate her in her position, and against the board of education to compel them to pay her her arrears of salary. This application was denied by Mr. Justice SUTHERLAND, in March, 1864, and the relator now appeals to the general term.

The act of 1851 gives no appellate jurisdiction over the trustees of common schools in the exercise of their powers to dismiss teachers and other officers of the ward schools and the ward primaries.

The statute only gives the board of education power to direct and prescribe general rules and regulations, under which teachers shall be contracted with and employed.

The counsel for the trustees is right in saying that the board has no power to say who shall be appointed, and that consequently it has no power to say who shall be dismissed.

The by-law, therefore, under which the relator has made this application, is without authority.

The order of the special term should be affirmed with costs.

Middlebrook agt. The Merchants' Bank.

SUPREME COURT.

LOUIS N. MIDDLEBROOK, respondent agt. THE MERCHANTS'
BANK, appellant.

By the will of a foreign testator at his death, or by the issue of letters testamentary, or both, his executors are *vested with the title* of the testator's bank stock in this state, as well as to all his chattels and personal estate, wherever situate or being.

The foreign executors thus having the title to the bank stock in this state, have a right to assign it to a purchaser, and to execute a power of attorney authorizing the transfer to him.

And the bank refusing to permit such transfer, is liable to the assignee of the executors in an action brought here in his own name. (*This affirms S. C. at special term, 24 How. Pr. R. 267.*)

New York General Term, March, 1864.

Before LEONARD, P. J., CLERKE and SUTHERLAND, Justices.

APPEAL from a judgment rendered at special term in favor of the plaintiff. This action was brought by the plaintiff to compel the bank to allow the transfer of one hundred shares of their stock standing in the name of Robert Middlebrook, deceased, to his son, Louis N. Middlebrook, the plaintiff. The facts were as follows: The deceased was a resident of Trumbull, in the probate district of Bridgeport, Connecticut, and died in May, 1861. By his last will he gave \$16,000 of bank stock to the plaintiff, to be selected by him and appraised, and he appointed three persons, all residents of Connecticut, his executors. The executors proved the will in the probate court for the district of Bridgeport; letters testamentary were granted to them, and they proceeded to settle the estate according to the will. The testator held stock in five or six other banks in the city of New York. The plaintiff selected one hundred shares of the stock in defendant's bank as a part of his legacy. The shares were appraised, and the executors executed in Connecticut, a transfer of the shares to the plaintiff, who applied to the bank for leave to transfer the

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item into his own name on the transfer books of the bank. The bank refused to allow the transfer, on the ground that the executors had no right to dispose of these shares without first taking out letters testamentary in this state.

B. W. BONNEY, *for appellant.*

E. SEELEY, *for respondent.*

SUTHERLAND, J. It is not necessary to examine or determine the question whether the personal estate of the testator on his death vested immediately in his executors, the plaintiff's assignors, and before the will was proved, and they qualified as executors.

The bank put its refusal to permit the transfer, solely on the ground that letters testamentary or of administration, had not been taken out in the state of New York.

Before the assignment to the plaintiff and the refusal of the bank to permit the transfer to him under the power of attorney, the executors had exhibited to the officers of the bank documentary evidence of their title as foreign executors.

The ground upon which the bank refused to permit the transfer to the plaintiff, and the ground upon which the counsel of the bank upon the argument insisted it was justified in so refusing, was substantially that the bank was not obliged to recognize the title of a foreign executor, or a title from or through a foreign executor. In this I think the bank and its counsel were mistaken.

The cases in this state only show, I think, that the courts in this state will not recognize the right of a foreign executor or administrator to sue in the courts of this state, under or by virtue of his foreign letters testamentary or of administration. (*Parsons agt. Lyman*, 20 N. Y. R. 103, and cases there cited.)

I suppose there is no reasonable ground for saying or doubting that the title of a testator's bank stood in this

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state, as well as to all his chattels and personal estate, wherever situate or being, vested in his executors, either by the will on his death, or by the issue of letters testamentary to them, or both.

Having the title of the bank stock in question, they had a right to assign it to the plaintiff, and to execute the power of attorney authorizing the transfer to him.

I do not know that it has ever been questioned but that even a foreign statutory bankrupt proceeding passed the title to the bankrupt's property here, as between the bankrupt and his assignees.

The cases in this state only go to show, I think, that the plaintiff's assignors, as Connecticut executors, could not have maintained an action against the bank for refusing to permit them to transfer the shares. Perhaps you may say that the bank was not legally bound to permit the transfer on the demand of the executors before the assignment to the plaintiff, because the executors could not, as foreign executors, bring an action for such refusal in their own names, as such executors; but if the executors could and did transfer the shares of stock to the plaintiff, and could and did execute the power of attorney for its transfer on the transfer books, the bank, I think, was bound to recognize the plaintiff's title to the stock, and his right to have it transferred to him on the transfer books, and for refusing to permit such transfer, I think the bank is liable in this action, brought in the name of the assignee of the executors.

It is utterly immaterial whether the assignment to the plaintiff, and the power of attorney for the transfer of the stock, were executed in Connecticut or in this state.

The judgment should be affirmed with costs.

Concur, T. W. C.

LEONARD, J. The law of the foreign domicil of the testators and the executors, governs in respect to the transfer of personal property, except perhaps, where the transfer

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interferes with the remedy of domestic creditors in the courts of the state where the property is situate.

I concur.

The judgment should be affirmed with costs.

SUPREME COURT.

ALEXANDER SAUNDERS agt. JOHN KEOUGH.

The grounds of appeal stated in a notice of appeal from a justice's judgment in the following form, was held sufficient, especially the first and fourth statements, to wit: *First*—The judgment should have been for the plaintiff for at least \$15 damages, besides costs, instead of being against him for costs.

Second—The justice erred in admitting improper evidence on the part of defendant, after proper objections were made to the same by the plaintiff.

Third—The justice erred in excluding proper evidence offered on the part of the plaintiff.

Fourth—The judgment is without evidence, and contrary to law.

Fifth—The judgment is against both law and evidence.

It seems that the notice of appeal in these cases was intended, as one object, to dispense with the formal affidavit which was formerly required in order to bring a writ of *certiorari*; and this object would be defeated to a great extent, if the same precision was necessary to be stated in the notice of appeal as was required by such affidavit.

Albany General Term, March, 1864.

PECKHAM, MILLER and INGALLS, Justices.

APPEAL from order of county judge of Schenectady county. The action was commenced in a justice's court, and a judgment was rendered in favor of the defendant for costs. The plaintiff served notice of appeal to the county court, which notice specified the following grounds of appeal: "First—The judgment should have been for the plaintiff for at least \$15 damages, besides costs, instead of being against him for costs. Second—The justice erred in admitting improper evidence on the part of defendant, after proper objections were made to the same by the plaintiff. Third—The justice erred in excluding proper evi

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dence offered on the part of the plaintiff. Fourth—The judgment is without evidence, and contrary to law. Fifth—The judgment is against both law and evidence.” The defendant moved to dismiss the appeal. The county court granted the motion with ten dollars costs, with leave to amend the notice of appeal by inserting the grounds, on payment of said ten dollars costs within ten days after service of copy of order. The plaintiff appealed from this order to the general term of the supreme court.

H. SMITH, *for plaintiff and appellant.*

D. C. BEATTIE, *for defendant and respondent.*

MILLER, J. It is insisted that the grounds stated in the notice of appeal are insufficient, and not in compliance with the provisions of section 353 of the Code. The section cited provides that the notice of appeal must state the grounds upon which the appeal was founded, and the intention doubtless was that it should be sufficiently specific, so as to advise the opposite party, the justice, and the appellate court, of the reasons for appealing from the judgment and especially to direct the attention of the justice to the points in reference to which errors are alleged to have been committed, so that he could make a proper return to the appeal.

In the case of *Derby agt. Hannin* (15 How. 32), the notice of appeal stated that the judgment was clearly against the law and evidence in the case, and it was held that no ground was stated. Only a conclusion of law was there stated. In *Deuchars agt. Wheaton* (16 How. 471), the grounds of appeal are alleged to be that material testimony offered on the trial was excluded; that material testimony was admitted which ought to have been excluded; that the evidence was insufficient, &c., and it was held that the allegations were too vague and general; that they pointed to no particular error or decision of the justice. It will

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be noticed that it was not stated that any objection was made to the testimony admitted, nor how the testimony was excluded.

No cases which I have been able to find have gone further in holding that general grounds specified are insufficient, than the two above cited. Neither of them, however, presented as strong a case as the one now under consideration. The allegations in both were exceedingly general, so that it would be quite difficult to learn what the alleged errors were.

The notice in the present case is by no means as defective, and certainly is not liable to the objections so clear and palpable in those cited.

The first ground of error alleged here is, "that the judgment should have been for the plaintiff, for at least \$15 damages, besides costs, instead of being against him for costs." It states somewhat definitely that the alleged error consists in rendering a judgment on the whole case for the defendant, when it should be for a specific sum the other way. It virtually alleges the existence of evidence which would justify and authorize a different and a contrary judgment from what actually was rendered, and no other judgment. It does not state the testimony, nor is this essential. But it does allege with precision in what respect the judgment was erroneous. I think this was enough to apprise the party, the justice, and the appellate court, that a judgment had been rendered erroneously for the defendant, which the evidence showed should have been in favor of the plaintiff for a specific amount.

The second and third grounds are far more specific in pointing out the rulings of the justice upon the questions of evidence than in the case reported in 16 *How.* 471, and I am by no means confident that they are not sufficiently explicit. The second one calls attention to the admission of improper evidence on the part of the defendant, after proper objections were made by the plaintiff; and the

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third to the exclusion of proper evidence offered by the plaintiff. I am not prepared to say that it is necessary to go further and to state with particularity the evidence admitted and rejected, after objection. One object of the notice was to dispense with the formal affidavit formerly required in order to bring a writ of certiorari, and if the same precision was necessary in the notice of appeal, that object would be defeated to a very great extent. Such a practice would convert the notice into an affidavit, substantially the same as was required before the Code, which could not have been intended. It is unnecessary, however, to pursue the subject further, as I deem the first ground sufficient.

I am also inclined to think that the fourth ground of error is well stated. The allegation is that a judgment has been rendered without any evidence whatever to support it. This is a fact, and not a conclusion of law.

The order of the county court must be reversed with costs of appeal.

I concur, C. R. INGALLS.



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COURT OF APPEALS.

PLINY JEWELL, respondent agt. OLIVER C. WRIGHT, WILLIAM J. DUNLAP AND VIRGIL C. TAYLOR, appellants.

Where an *accommodation promissory note* is made in this state and payable here, but is first negotiated in the state of Connecticut, the laws of New York must control as to the *defence of usury* upon it

June Term, 1864.

APPEAL from a judgment of the supreme court at general term, in favor of the plaintiff, on a verdict taken subject to the opinion of the court at general term in first instance.

This action was brought to recover the amount of a promissory note of which the following is a copy :

" \$400. Lockport, May, 30, 1857.

" One year after date, I promise to pay to the order of Wm. J. Dunlap, four hundred dollars, at Niagara County Bank, value received. (Signed) O. C. Wright.

" Indorsed—Wm. J. Dunlap,
V. C. Taylor."

The defence interposed is, that the note is usurious and void.

On the trial at the Niagara circuit, in September, 1860, the following facts were conceded: That the note was made by Wright and indorsed by Dunlap, without consideration, and for the benefit and accommodation of the defendant Taylor; that Taylor took it to Hartford, in the state of Connecticut, and there induced the plaintiff to guaranty it, and thus guaranteed he indorsed it, and procured Albert Day to discount it, which he did at the rate of twelve per cent., by reserving out of the amount of the note forty-eight dollars, and paying Taylor three hundred and fifty-two dollars as the proceeds of the note. All of which was done without the knowledge or consent of the defendants Wright and Dunlap.

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When the note matured it was properly presented at the Niagara County Bank (which is in Lockport, in this state), and protested for non-payment, and the plaintiff in accordance with his guaranty, paid the note to Day, and then brought this action.

The plaintiff without objection, read in evidence from the Revised Statutes of Connecticut, of 1849, pages 618 and 619, being the "act to restrain the taking of usury." In accordance with the provisions of said act, he proved the amount due on the note to be \$401.66, for which sum the court directed a verdict for the plaintiff, subject to the opinion of the court at general term, on a case to be made. The general term gave judgment for the plaintiff on the verdict. From which judgment the defendants appealed to this court. The case was submitted here on printed arguments.

GEO. W. COTHRAN, *for appellants.*

I. In determining the validity of a contract purely personal, will the court give effect to the law of the place where the contract was made, or the law of the place where it is, by its terms, to be performed, is the precise question to be passed upon in this case.

1. In contemplation of law, this contract was made in Connecticut, for it was there that the note was first delivered as the evidence of an existing indebtedness (*Cutler agt. Wright*, 22 *N. Y. Rep.* 472-4).

2. In general, the validity of personal contracts is determined by the law of the place of making. In fact, it is the universal rule unless the parties stipulate otherwise. (*Story on Con. of Laws*, §§ 317, 320, 332, 340; *Curtis et al. agt. Leavitt*, 15 *N. Y. Rep.* 227.)

3. But where the contract by its terms is to be performed in a state other than that in which it was made, effect will only be given to the laws of the place of performance.

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1. Such has frequently been declared to be the law of this state by the supreme court, by the court for the correction of errors, the court of chancery, and the court of appeals. (*Cutler agt. Wright*, 22 *N. Y. Rep.* 472, 474, 480-9; *Everett agt. Vendryes*, 19 *N. Y.* 436; *Bowen agt. Newell*, 13 *N. Y.* 290; *Curtis agt. Leavitt*, 15 *N. Y.* 14, 85-9, 91, 227, 296 (10); *Hyde agt. Goodenow*, 3 *N. Y.* 266; *Burckle agt. Eckhart*, 3 *N. Y.* 132; *Lee agt. Selleck*, 32 *Barb. S. C. R.* 522; *Pomeroy agt. Ainsworth*, 22 *Barb.* 120 and 127-9; *President &c. of Bank of Commerce agt. Rutland R. R. Co.* 23 *How. Pr. R.* 180; *Thompson agt. Ketcham*, 4 *J. R.* 285; *Warren agt. Lynch*, 5 *J. R.* 239; *Thompson agt. Ketcham*, 8 *J. R.* 189; *Fanning agt. Consequa*, 17 *J. R.* 511; *Scofield agt. Day*, 20 *J. R.* 102; *Sherrill agt. Hopkins*, 1 *Cow.* 103; *Martin agt. Hill*, 12 *Barb.* 631; *Balme agt. Wornbough*, 38 *Barb.* 352; *Chapman agt. Robertson*, 6 *Paige Ch.* 627; *LeBreton agt. Miles*, 8 *Paige Ch.* 261.)

2. It is the doctrine established in the supreme court and circuit courts of the United States. (*Andrews agt. Pond*, 13 *Peters' R.* 65; *Cox agt. United States*, 6 *Peters' R.* 172; *Van Rensdyke agt. Kane*, 1 *Gall. R.* 371; *Emery agt. Greenough*, 3 *Dall.* 370; *Lanusse agt. Barker*, 3 *Wheat.* 101, 146; *Slocum agt. Pomroy*, 6 *Cranch*, 221; *Harrison agt. Sterry*, 5 *Cranch*, 289; *Pope agt. Nickerson*, 3 *Story C. C. R.* 465; *Strother agt. Lucas*, 12 *Peters' R.* 410, 436, *per BALDWIN, J.*; *Bell agt. Bruen*, 1 *How. U. S. R.* 169, 182.)

3. It has long been the law of England. (*Cooper agt. The Earl of Waldegrave*, 2 *Beavan*, 282; *Robinson agt. Bland*, 2 *Burrow*, 1077; *Melan agt. Duke of FitzJames*, 1 *Bos. & Pull.* 138; *Robinson agt. Bland*, 1 *Black. Rep.* 247, 258; *Rothschild agt. Currie*, 1 *Q. B. Rep.* 43.)

4. So held at Westminster Hall (*Thompson agt. Powles*, 2 *Simons' Rep.* 194).

5. And in the House of Lords. (*Down agt. Lippman*, 5 *Clark & Fin. R.* 1, 13, 19, 20; *Ferguson agt. Fyffe*, 8 *Clark*

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& *Fin. R.* 121; *Pattison agt. Mills*, 1 *Dow. & Clark*, 342, 362.)

6. It is the law of Vermont (*Pecks agt. Mayo*, 14 *Vermont Rep.* 33).

7. And also of Indiana (*Shanklin agt. Cooper*, 8 *Blachf.* 41).

8. The same is true of Massachusetts. (*Powers agt. Lynch*, 3 *Mass.* 77; *Prentiss agt. Savage*, 13 *Mass.* 20, 23, 24, *per PARKER, J.*; *Blanchard agt. Russell*, 13 *Mass.* 1; *Carnegie agt. Morrison*, 2 *Metcalf*, 381.)

9. Also of Kentucky. (*Tyler agt. Trabue*, 8 *B. Monroe R.* 306; *Goddin agt. Shipley*, 7 *B. Monroe*, 575.)

10. And of Louisiana. (*Malpica agt. McKown*, 1 *Louis. Rep.* 457, 458, 460, and notes; *Percy agt. Percy*, 9 *Louis. R.* 185.)

11. It is the settled doctrine of Missouri. (*Broadhead agt. Noyes*, 9 *Missouri R.* 55; *Dorsey agt. Hardesty*, 9 *Missouri R.* 157.)

12. And also of Connecticut (*Smith agt. Mead*, 3 *Conn.* 253).

13. It is the law of Ohio (*Kanaga agt. Taylor*, 7 *Ohio State R.* 134).

14. And of Illinois (*Sherman agt. Gassett*, 4 *Gilman*, 521).

15. It is one of the elementary principles of the law. (*Story on Con. of Laws*, §§ 242, 242 a, 280; 2 *Kent's Com.* 606-9, and notes, 9th ed.; 2 *Parsons on Contracts*, 95, 100, 2d ed.; 2 *Fonbl. Eq. B.* 5, ch. 1 § 6, and note; *Chitty on Bills*, 168, 169, 12th Am. ed.; *Story on Promissory Notes*, § 165; 2 *Parsons on Bills*, 320; *Byles on Bills*, 314 to 316, marg. page; *Story on Bills*, § 147; *Buyley on Bills*, 249, 5th ed.; *Marius on Bills*, 75, 89, 93, 101, 103; *Edwards on Bills*, 180, 182.)

16. It is a maxim of the Roman law: "*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit.*"

17. It has the general assent of the principal foreign

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jurists. (*Boullenois Observ.* 46, pp. 475, 476, 488; 1 *Hertii Oper. De Collis Leg.* § 4, n. 53, p. 147, ed. 1737; *Voet. ad Pand. Lib. 4 Title 1*, § 29; 1 *Emerigon, C. 4*, § 8; *Voet. de Stat.* § 9, ch. 2, § 15, p. 270, ed. 1715; *Boullenois Quest. Contr. des Lois*, p. 339, &c.; 3 *Burge Com. on Col. and For. Law*, Pt. 2, chap. 30, p. 771, 772.)

II. The note having been put into circulation upon a usurious consideration—having been negotiated at the rate of twelve per cent. interest—it is wholly void, and the action cannot be maintained (3 *R. S.* § 72, 5th ed.).

III. A contract void by the law of the place where made, even though it is to be performed in another state, by the laws of which it would be valid, is by the just principles of international law void everywhere; as the courts of no state will enforce the void contracts of another state. (*Hyde agt. Goodenow*, 3 *N. Y. R.* 266; *Andrews agt. Herriott*, 4 *Cow.* 510, note a; *Andrews agt. Pond*, 13 *Peters' U. S. R.* 65; *Story on Con. of Laws*, § 243, and cases cited.)

1. The note in this case was void by the laws of Connecticut, as proved on the trial (*Laws of Conn. in case*, fol. 39 to 41, §§ 1, 2).

2. The statute embraced between folios 38 and 44 of case, is the only statute of Connecticut that was produced, proved, or admitted to be, or was read in evidence on the trial of this action.

3. The statute referred to, in the opinion of the supreme court, at folio 68, must have been furnished to the judge who wrote the opinion after the case had been submitted to the general term. The first knowledge that defendants' attorney had of said statute having been furnished to the court was when he read the opinion of the court.

4. It is denied that his honor had any right to receive from one of the counsel in a cause an important statute of a foreign state, and determine the cause upon it, without the knowledge of the counsel of the opposite party.

5. The laws of other states are regarded as facts, to be

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alleged and proved as other facts in a cause. (*Monroe agt. Douglass*, 1 *Seld.* 447; *Cutler agt. Wright*, 22 *N. Y.* 472 and 489.)

IV. Interest is to be paid according to the law of the place where the contract is made, unless the payment is to be made elsewhere, and then it is to be according to the law of the place where the contract is to be performed. (2 *Kent's Com.* 608 and notes, 9th ed.; *Thompson agt. Powles*, 2 *Simons' Rep.* 194; *Story on Con. of Laws*, §§ 305, 291, 292, and cases cited; *Boyce agt. Edwards*, 4 *Peters*, 111; *Cash agt. Kennion*, 11 *Vesey*, 304; *Scofield agt. Day*, 20 *John.* 102; *De Wolf agt. Johnson*, 10 *Wheat.* 367, 383; *Story on Bills*, § 148, and cases cited.)

V. It is not considered necessary to review at length the opinion of the supreme court in this case, having shown it so entirely against the weight of authority, both in this country and in England. And it may be safely asserted that it is unsupported by any elementary treatise in the English language. The learned judge endeavors to sustain his position by *Story's Treatise on the Conflict of Laws*, and quotes but a single sentence from section 242. Had he quoted the whole of that and the following section, as well as section 280, which was cited on the brief used at general term, he would readily have discovered his error. He seems to misapprehend *Story*, and does not correctly discriminate between the different rules of law applicable to contracts payable generally, and to contracts which by their terms, are to be performed in a foreign country. If this contract was not to be performed in New York, then his argument would be correct.

He relies upon *Pratt agt. Adams* (7 *Paige*, 615). A sufficient answer to that case is, that Chancellor WALWORTH decided the same question the other way, before and subsequent to that decision (see 6 *Paige* 667, and 8 *Paige*, 26). And *Pratt agt. Adams*, is the authority upon which *City Savings Bank agt. Bidewell* (29 *Barb.* 325), was decided.

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The opinion in this latter case is *sui generis*. I will venture to say that the like was never written. It is as follows :

“ If the thing to be done on the face of the contract was contrary to the laws of New York, the rule that the law of the place of performance must control, might perhaps apply. But in this case, the loan was clearly made in Connecticut, and the excessive interest was taken there. If, therefore, no more interest was taken than the law of Connecticut allows, it surely cannot be illegal to agree to repay it in New York.”

The judge who wrote this opinion, fell into a fundamental error in assuming that the recovery on a usurious contract could not be defeated, unless “ the thing to be done ” (by which awkward expression, I presume he has reference to the usurious agreement) should “ appear on the face of the contract.” In the great majority of cases where recoveries are defeated on the ground of the illegality or invalidity of the contract, this invalidity or illegality in no way appears from the written contract, but is shown by proof *aliunde*.

Let us endeavor to discover what is meant in this opinion. I presume the court meant to say that if the contract was usurious on its face, then the rule that the law of the place of performance would be looked to in ascertaining the validity or invalidity of the contract would apply. Assuming this to be what the court intends by the inelegant phrase, “ if the thing to be done,” then it follows, the court being in error in assuming that in order to defeat a usurious contract, the usury must appear upon its face, that the court really decide that the law of the place of performance must control a contract made in one state to be performed in another. To make this more apparent, let us further suppose that the court had decided that it was not necessary that the usury should appear upon the face of the contract—which is the law—then they would have held that the law of the place of performance must control, because they

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decline to so hold simply because the usury did not appear "on the face of the contract." Therefore, instead of being an authority to sustain the recovery in this case, it really is an authority—if it can be regarded as an authority for any purpose—in favor of the defence.

The court seemed to misapprehend the case of *Andrews agt. Pond* (13 *Peters*, 65). In that case the bill was drawn in New York, payable in Mobile, and was usurious according to the law of New York. The action was in Alabama. While Chief Justice TANEY distinctly asserts the doctrine that the law of the place of performance must govern, he yet decides the case on the exception to that rule, which is this: A contract void by the law where made, will be treated as void every where. This is the doctrine maintained in our third point.

The learned judge in referring to the case of *Pratt agt. Adams, supra*, does not seem to bear in mind a rule of law so well settled that it is unnecessary to cite authorities, that where a contract is made in one state, to be performed in another, the parties may stipulate the highest rate of interest allowed in either.

VI. The judgment must be reversed, and judgment ordered for the defendants, with costs.

JAMES S. GIBBS, *for respondent*.

I. The promissory note in this case, though dated at Lockport, in this state, and made payable at a bank there, was first negotiated at Hartford, in the state of Connecticut. As a contract it had its inception in Connecticut. We therefore say the *lex loci contractus* governs (*Story on Conflict of Laws*, § 237).

II. The reason of the *lex loci contractus* is, that every person contracting in a country, is understood to submit himself to the laws of the place, and silently to assent to its action upon his contract (*Story's Conflict of Laws*, § 261). So too of its nature and obligation (§ 263).

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III. The question whether a contract is usurious or not, depends not upon the rate of interest allowed, but upon the validity of that interest in the country where made (7 *Paige*, 616). This case of 7 *Paige*, 616, is precisely in point in this case.

IV. A note was made in New Orleans, payable in New York, with ten per cent. interest, held not void for usury. (20 *Martin's R.* 1, cited *Story's Conflict of Laws*, § 298; cited and approved in 6 *Paige*, 627, 634.)

V. The courts of a country are presumed to be the best expositors of its own laws, and of the operation of them upon contracts made there. (*Ch. J. MARSHALL*, in 10 *Wheaton*, 159; 17 *Martin's R.* 587.)

VI. The Revised Statutes of Connecticut, 1849, pages 618 and 619, define and restrain the taking of usury. And the supreme court of Connecticut have placed a construction upon this statute (27 *Conn. Rep.* p. 363).

VII. Where a loan is made in Connecticut, at a greater rate of interest than is allowed by the laws of this state, but no greater than the legal rate in Connecticut, the fact that the note is made payable in this state will not render the transaction usurious, and the note invalid. And it rests with the defendants to show that the transaction is contrary to the laws of Connecticut. (29 *Barb. S. R.* 325; *Cutler Ad. agt. Wright*, 22 *N. Y. R.* 472.)

The opinion of the court was delivered by INGRAHAM, J. It was not denied on the trial of this action, that the note on which the suit was brought was negotiated at an illegal rate of interest, both in Connecticut and New York. The main question in the case is whether the laws of New York or Connecticut are to control, as to the defence of usury. The note was negotiated in Hartford, but was payable at Lockport, in New York. Nor can it be denied that a contract is to be governed by the laws of the place where it is made, if it is not to be performed according to the con-

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tract elsewhere. (*Story on Con. of Laws*, § 282; 6 *Paige*, 230; 2 *Kent's Com.* 457; *Davis* agt. *Garr*, 2 *Selden*, 124.) But if such note or contract is by its terms to be performed in another state, then the laws of that state must govern 2 *Kent's Com.* 460).

This rule was laid down by this court in *Jack* agt. *Nichols* (1 *Seld.* 178). The court in delivering the opinion says: Concede that the contract was made in Connecticut, if it was to be performed in New York, it must *prima facie*, be regarded as having been made with reference to the laws of New York. The fact that the note was dated in New York, is alone presumptive evidence that the maker not only resided at the place of its date, but contemplated payment there. For the purpose of charging the indorser, the makers must have been sought at their residence or place of business in this state.

The same is stated in *Curtis* agt. *Leavitt* (15 *N. Y. Rep.* 9, 227), where it is said, "it is a general rule that the laws of the place where contracts purely personal are made, must govern as to their construction and validity, unless they are to be performed in another state or country, in which case their construction and validity depend upon the law of the place of performance." In *Bowen* agt. *Newell* (13 *N. Y. Rep.* 290), it was held that the law of the place where the note or draft is payable, governs as to the days of grace allowed upon it. In *Everett* agt. *Vendryes* (19 *N. Y. Rep.* 426), it was held that the law of a place where the bill was payable, controlled as to the liability of the drawer to the indorser. And in *Cutler* agt. *Wright* (22 *N. Y. Rep.* 472), it was held that a note made in New York, but dated in Florida, and payable there, was governed by the laws of that place. And it is said the authorities do not leave this question in doubt. The same was also held in *Pomeroy* agt. *Minsworth* (22 *Barb.* 127). These cases from our own courts, render it unnecessary to examine any other class of decisions upon this point.

Judgment should be reversed, and a new trial ordered.

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NEW YORK SUPERIOR COURT.

CHARLES PETERSON, respondent agt. THE CHEMICAL BANK,
appellant.

An executor takes his title to the testator's estate by virtue of the execution of his will, not by the probate of it.

The authority of an administrator with the will of the decedent annexed, is coextensive with that of the executor, whose place he takes.

A foreign executor or administrator need not produce his letters in order to bring an action for the recovery of chattels converted, except to prove his title on the trial, if contested. The right of possession draws to it in contemplation of law, the constructive possession invaded by the wrong-doer; and there is no need of stating the mode of acquiring title. So in actions upon choses in action negotiable by delivery, the same rule prevails.

The assignee and purchaser of a negotiable chose in action from a foreign executor or administrator, with the will annexed, can recover in his own name in our courts from a debtor resident here. (See to the same effect *Middlebrook agt. The Merchants' Bank*, ante, p. 474.)

Heard General Term, December, 1863.

Before ROBERTSON, BARBOUR and GARVIN, Justices.

Decided February, 1864.

AARON COHEN, domiciled at New Haven, in the state of Connecticut, where he had resided for six years, died, and was buried at that place in July, 1862, leaving assets there, and a last will and testament, which was admitted to probate by the probate court within and for the district of New Haven, and the executors named in the will having failed to accept and discharge the trust, a grant of administration, with the will annexed, was made to David J. Peck, Esq., city judge of New Haven, at the request of the next of kin, and upon his giving a bond with approved sureties in the sum of two hundred thousand dollars.

At the time of his death, Mr. Cohen had on deposit in the Chemical Bank, in the city of New York, the sum of \$32,321.24, duly entered in his bank book, which came into the possession of the said administrator upon the death of said Cohen. That sum is the balance struck by the bank

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itself. The administrator presented, duly authenticated, the record of the probate of the will in Connecticut, and of the grant of administration to him, and requested payment, which the bank refused. He presented, also, in writing, the request of all the next of kin, except the one in Savannah, in which all the legatees residing at the north united, that payment should be made to him, and offered to give the bank a bond of indemnity, but the bank still declined.

Subsequently, at the city of New Haven, he sold and assigned to the plaintiff, for cash to the full amount, the account, debt and demand against the bank for the money so deposited, and there delivered to him an assignment of the same under seal, together with the bank book of the deceased, and also there drew his check upon the bank for the amount in favor of the plaintiff. The plaintiff presented the record of probate, the grant of administration, and the assignment, all duly authenticated, together with said check to said bank, but payment was refused. He then presented his own check, payment of which was also refused. The bank book in his possession was also presented to the bank. (*Case*, pp. 35, 36, 37, and *folios* 184, 188, 189, 194 to 204, 207, 209, 210.) Suit was commenced the same day against the defendant, and by direction of the court the jury found a verdict for the plaintiff, for \$83,496.88, being the balance in the bank, with interest from the commencement of the action or date of demand by the plaintiff.

The testator left no debts in this state. He resided in New Haven, occupying all the rooms on the first floor of one of the houses connected with the hotel, taking his meals in his room, and having his horses and carriage, and servants in that city. Being an invalid, and the house not sufficiently warm, he was accustomed to board during a few months in winter, at a hotel in the city of New York, occupying a single room, and taking his meals at a public table;

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but before his return to New Haven in the spring of 1862, he stated that he would never come back to New York, or live in a hotel; that he would buy a house in New Haven, and be in his own house. He accordingly bought a house and garden in New Haven, which were occupied by his servants, and gave instructions for furnishing and fitting it up for a winter and summer residence. He often declared his intention of remaining in New Haven. He died July 27, 1862.

R. B. ROOSEVELT, *for defendant, appellant.*

WILLIAM BLISS, *for plaintiff, respondent.*

I. The grantee of an executor or administrator with the will annexed, who has obtained letters in another state, has a right to sue in the courts of this state for the protection or enforcement of his rights.

1. This has been expressly decided by the supreme court of this state *Middlebrook agt. The Merchants' Bank*, 24 *How. Pr. R.* 267; *S. C.* 14 *Abb. R.* 462), and by the supreme court of the United States, as to a chose in action (*Harper agt. Butler*, 2 *Peters*, 239). The principle is also contained in *Parsons agt. Lyman*, (20 *N. Y. R.*; 6 *Smith*, 103; *Smith agt. Webb*, 1 *Barb. Sup. R.* 230).

2. Administrators with the will annexed, "have the rights and powers, and are subject to the same duties, as if they had been named in the will" (2 *Rev. Stat. p.* 72, § 22).

"This statute has not been understood as introducing any new principle of law." (*Dominick agt. Michael*, 4 *Sand. S. C.* 409, 410; *Edgerton's Adms. agt. Conklin*, 25 *Wend. R.* 233; *Beekman agt. Bronson*, 23 *N. Y. R.* 9 *Smith*, 303.)

It is a re-enactment of the common law (*Dominick agt. Michael*, 4 *Sand. Sup. C. R.* 410, 414).

So at common law, an administrator appointed during the minority of one entitled to administration, or if a man

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appoint an infant his executor, and that another shall have the administration during his nonage, such administrator has the power and authority of an absolute administrator or executor (*Com. Dig. Ad. F*). The executor of an executor has the same interest in the goods of the first testator as the first executor (*Com. Dig. Ad. G*).

After the grant of letters, the title of every administrator relates back to the death of the decedent, from whom he directly takes title. (*Com. Dig. Ad. B*, 10; *Valentine agt. Jackson*, 9 *Wend.* 302; *Babcock agt. Booth*, 2 *Hill*, 181.)

An administrator with the will annexed, has "the same rights and powers" as if he had been named as executor.

3. Receivers or trustees of the effects of an insolvent corporation of another state, appointed under the laws of such state, with power to take possession of all the effects of such corporation, and "to sell, convey and assign" its personal estate, have power to sell and assign a debt due to the corporation from a citizen of this state, and such assignment gives to the purchaser the equitable right of action in the courts of this state. (*Hoyt agt. Thompson*, 5 *N. Y.* 1 *Selden*, 320; *Matter of Bristol*, 16 *Abbott's R.* 184, 186, 187; *Olyphant et al. agt. Atwood*, 4 *Bos.* 461.)

The powers of an executor or administrator are not less ample.

II. The owner of personal property has a right to dispose of it, either by an act taking effect in his lifetime, or by his last will and testament at his death. His disposition in either way is effectual to vest the title, wherever the property may be situate, and whatever may be the place of residence or domicile of such owner, or place of execution of such act or testamentary instrument. It is not merely the right, but it is "the duty" of his debtors to pay their debts "to him while living, and according to his appointment after his death" (*Parsons agt. Lyman, supra*, p. 113.)

III. The administrator with the will annexed, appointed

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under the laws of the state of Connecticut, where the testator lived and died, and where he left assets at his death, by virtue of the grant of letters to him acquired a valid title to the property of the testator in this state, which in the absence of letters in this state, any debtor or person in possession of such property, might safely recognize by the payment of debts or the delivery of such property, and the administrator having such valid title, was authorized to receive such payment and such property, and to give a sufficient receipt and discharge therefor. (*Parsons agt. Lyman*, 20 N. Y. R. 6 *Smith*, 112 to 115; *Adams agt. Smith*, 1 Atk. 63; *Doolittle agt. Lewis*, 7 John. Ch. R. 45; *Vroom agt. Van Horn*, 10 Paige, 549; *Brown agt. Brown*, 1 Barb. Ch. R. 189; *Coley's Estate*, 14 Abb. 461.)

The defendant, instead of retaining this large sum without interest, should have performed its "duty" by prompt payment.

IV. "The legal title to all the personal property of the deceased, including choses in action, vests in administrators, as well as executors, and they can dispose of it at pleasure, being responsible for the faithful execution of the trust." (*Beecher agt. Buckingham, et al.* 18 Conn. R. 110; *same case and same point*, 18 Conn. R. 120; *Perkins agt. Stone*, 18 Conn. R. 276; *Smith agt. Milles*, 1 Term R. 480; *Comyn's Dig. Administration, A*; *id. Administration B*, 10; *id. Administration, B*, 12.)

"The right draws after it the constructive possession." (*Per ASHURST, J. Smith agt. Milles, supra*; *Comyn's Dig. Administration, B*, 10; *Valentine agt. Jackson, supra*; *Babcock agt. Booth, supra*.)

This legal title, extending to all the property of the deceased, extends to that without the state. It is the title of the executor or administrator to the property out of the state, which only renders payment or delivery to him, or his discharge valid. In *Shultz agt. Pulver* (11 Wend. R. 363), an administrator appointed in this state was held

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responsible for a neglect to collect in Pennsylvania a debt due to the intestate by a debtor residing in that state. He was, therefore, entitled to collect it. In *Perkins agt. Stone* (18 Conn. R. 270, 276), the personal representative appointed in Connecticut sued a resident of Massachusetts, in whose hands in the last mentioned state, bills receivable were for collection and conversion into money at the decedent's death, for negligence, by which a part of the moneys secured by said bills was lost, such resident of Massachusetts having subsequently come into Connecticut. The plaintiff recovered, and the recovery was held right.

Where the payee of a promissory note, which is made by one citizen of this state to another citizen of this state, indorses it specially to a citizen of another state, who dies, and whose will is admitted to probate in that state before the note falls due, and his executor, without taking administration in this state, sends the note to a notary public in this state, with directions to demand payment at the maturity of the note, and give notice to the indorser, and such notary makes demand and gives due notice to the indorser, such demand and notice are sufficient. The foreign executor is entitled to receive payment (*Rand agt. Hubbard*, 4 Metcalf, 252).

2. If the right of the executor or administrator were limited to the jurisdiction within which he was appointed, he could not sell or dispose of goods at sea, nor insure them, for he could have no insurable interest, if they were on the high seas at the death of the decedent and grant of letters.

3. The numerous cases as to the transmission of assets from one jurisdiction and one administrator to another, recognize the completeness and universality of the title of the foreign executor or administrator. The assets thus transmitted form part of the estate, vested in the administrator by the grant of administration, or in the executor by the death of the testator.

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V. An executor or administrator represents the person of the intestate, and so far as the title of personal property is concerned, stands in his stead, being his "assignee in law." (*Co. Lit.* 209, *A*; *Comyn's Dig. Chan.* 3 *G*, 1; *id. Administration B*, 11 and 12; *Schultz agt. Pulver*, 11 *Wend.* 363.)

VI. The administrator with the will annexed, thus representing the person of the testator, and having vested in him the title of all his property, had a right to dispose of it. (*Nugent agt. Gifford*, 1 *Atk.* 463; *Mead agt. Orrery*, 3 *Atk.* 237, *see p.* 239.)

The sale in the present case was made within the jurisdiction in which the administrator was appointed. A purchaser from an executor is not bound to ascertain whether a sale is proper or not (*Cole agt. Miles*, 17 *Eng. L. & Eq. R.* 582).

A creditor has only a personal demand and no lien upon the assets, and where an assignment is for valuable consideration, it is good both at law and in equity, unless fraud is proved. (1 *Atk.* 463; 3 *Atk.* 239.) But there were no debts in this state.

VII. The testator was domiciled in the state of Connecticut. So the probate record states. Both the fact and the intention concurred (*Story's Con. of Laws*, §§ 41, 44). The weight of the evidence is so strong that the jury would have found the fact at once, and if it had been otherwise, and such finding had been material, the verdict would have been set aside. (1844, *N. Y. Com. Pleas, Matter of Crawford*, 3 *N. Y. Leg. Obs.* 76; 1849, *Isham agt. Gibbons*, 1 *Brad.* 69; *Cambridge agt. Charlestown*, 13 *Mass. R.* 561; *Putnam agt. Johnson*, 10 *Mass. R.* 433; *Chaine agt. Wilson*, 1 *Bos.* 673, *S. C.* 16 *How.* 552, and 8 *Abb.* 78; *Barry agt. Bockover*, 6 *Abb. Pr. R.* 374; *Houghton agt. Ault*, 16 *How. Pr. R.* 77.)

There was indeed no conflict of evidence. But domicile was not essential to confer jurisdiction on the court of pro-

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bate in Connecticut. Assets were sufficient. Full faith and credit is to be given to the probate of the will in a sister state, "to the public acts, records and judicial proceedings." (*Const. U. S. Article 4, § 1; 2 Rev. Stat. p. 67, § 68 [§ 82, 4th ed.]; Laws of 1840, ch. 384, § 2 [2 Rev. Stat. p. 249, § 52, 4th ed.]*) So as to letters of administration or letters testamentary (*2 Rev. Stat. p. 69, § 31*). Indeed the bank book, the evidence of debt against the bank, came into the possession of the administrator in Connecticut, as a part of the assets of the estate, and was there, with a balance struck by the bank itself, delivered to the plaintiff.

VIII. The plaintiff having thus acquired title to the money deposited in the bank, had a right to demand payment of it, and to sue for it. (*Harper agt. Butler, 2 Peters, 239; Middlebrook agt. Merchants' Bank, supra.*)

That an executor or administrator, appointed in another state, cannot sue in the courts of this state, without first taking out letters here, has no application. The rule itself is of restricted application. Probate before hearing is sufficient (*Osgood agt. Franklin, 2 John. Ch. R. 1*). Executors appointed in another state may sue in this, when they claim not as executors, but as residuary legatees or purchasers, and this, although the assent of the executor is required to every legacy to perfect the title of the legatee (*Smith agt. Webb, 1 Barb. Sup. C. R. 230*). So he may sue on a contract with himself as executor (*Smith agt. Lawrence, 3 Barb. Ch. R. 71*).

An administrator may bring trover in his own name for the goods of his intestate, converted previous to the grant of administration, and need not declare in his representative character. (*Valentine agt. Jackson, 9 Wend. 302; Babcock agt. Booth, 2 Hill, 100.*)

An executor may bring trover or trespass, as he may alien the goods of his testator, before probate. (*Comyn's Dig. Administration, B, 9; 9 Wend. 303.*)

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2. The rule rests on the mere personal disability of the executor or administrator to prosecute or defend, in his representative character, without the previous ceremony or qualification of probate and letters in this state.

3. A person deriving title from an executor or administrator is not within the terms of the rule, nor its reason. He is not a foreign executor or administrator, and is under no disability to sue in our courts.

4. He sues to vindicate and enforce his own rights, not those of the administrator, and on a cause of action arising since the assignment.

5. Such a person cannot compel the administrator with the will annexed, to take out letters in this state, and if he did he could not sue, because he has parted with his interest (*Code*, § 111). The former must therefore sue.

6. If the plaintiff have no legal capacity to sue because the foreign administrator have none, the objection should have been taken by demurrer (*Code*, § 144), and according to the rule of the Code must be deemed waived (*Code*, §§ 147, 148).

7. But the cases of *Harper agt. Butler*, in the supreme court of the United States, and *Middlebrook agt. The Merchants' Bank, supra*, and other cases cited, show that the disability of the foreign executor or administrator does not extend to the person deriving title from him.

8. The cases rest on this distinction: "The foreign law furnishes the rule of decision as to the validity of the title to the thing claimed," but "it can only be asserted by the legal instrumentalities, which the institutions of the country, where the claim is made, have provided" (*Parsons agt. Lyman, supra*, p. 112).

9. There is no evasion of our laws, which have no extra-territorial force, but a submission to them by a conversion by sale instead of a collection by suit.

IX. The other grounds of exception are of no validity.

1. Upon such records of probate and of grant of admin-

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istration, the probate of wills in this state and new letters are daily granted. Death, domicil, and effects at New Haven, are also shown.

2. The objections to the admission of evidence, are for the most part to the effect of the evidence, rather than to the evidence itself and are not well taken.

3. The rule excluding public enemies from our courts, applies with full force to the citizens of the seceding states. (*Brandegee agt. Dinsmore*, 23 *How. Pr. R.* 397; *The United States agt. One thousand shares of the Great Western Railroad*, BETTS, J., *U. S. Dist. Court.*)

4. Two witnesses to such a will are sufficient, both in this state and Connecticut.

No foundation was laid in the evidence for the objection, which was also not taken to any evidence offered at the time. If the testator were domiciled here as the appellant contends, and the will executed here, two witnesses must be admitted to be sufficient. So if he were domiciled in Connecticut. Wills executed according to the laws of the state or country where executed, are valid in that state, and the probate of such wills is confirmed by statute. (*Conn. Ses. L. for 1863*, p. 7; *id. for 1856*, p. 67, *ch. 44.*)

5. The probate is conclusive, and cannot be collaterally questioned.

X. Judgment should be rendered for the plaintiff, with costs.

By the court, ROBERTSON, J. There is nothing in the evidence in this case that points at any other places of residence of the decedent (Cohen), than the cities of New York or New Haven, and assuming that each place in turn became his residence, according to the particular season of the year, the *animus manendi* at the latter city, at the time of his death clearly appears, as well by his declarations as his acts, to carry out such intention, the evidence of which is wholly uncontradicted. That was

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therefore properly withdrawn from the consideration of the jury, and the state of Connecticut must be assumed to have been the domicile of the decedent at the time of his death.

The state of Connecticut had, therefore, authority to declare in what names the personal estate of the decedent should be distributed, and to whom, unless the local positive law of some other government, within whose territory the same was situated, interrupted the same and gave it a different direction. (*Schultz agt. Pulver*, 11 *Wend.* 361, *S. C.* 3 *Paige's Rep.* 182; *Story's Con. of L.* 403-4; *Burge's Con. of L.* 156; *Holmes agt. Remsen*, 4 *J. Ch. R.* 460; *Sherwood agt. Judd*, 3 *Brad. R.* 267.)

The appointment of the officers of the law in various countries, where a decedent may have left assets, may be necessary to recover, protect and collect them. But the disposition of such funds when collected, depends upon the law of the domicile, and their distribution is to be made by officers appointed by that law, to whom such subsidiary collectors may be compelled to account (*Ordronaux agt. Helie*, 3 *Sand. Ch.* 512).

The tribunals of the state where the decedent was domiciled, may decree the disposition of assets in the hands of a subsidiary administrator in another state (*Lecarez agt. The Mayor, &c. of New York*, 2 *Sand. R.* 173), and such decree is conclusive upon the parties thereto in an accounting by the latter administrator in his own state (*Churchill agt. Prescott*, 3 *Brad. R.* 233). A judgment against the principal administrator is binding on the ancillary one (*Cummings agt. Banks*, 2 *Barb. Rep.* 602). A different rule however prevails as to payments of debts of the deceased, as to which the distribution of his estate must be made equitably, under authority of the local jurisdiction in which they are due (*Lawrence agt. Elmendorf*, 5 *Barb. Rep.* 73).

Whenever the law of his domicile allows a decedent to dispose of his estate, the title must necessarily pass by the

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will. (*Coke Lit.* 209, *A*; *Com. Dig. Ch. 3 G*, 1; *Id. Ad. B*, 11, 12; *Schultz agt. Pulver*, 11 *Wend. R.* 361.) An executor takes his title to the testator's estate by virtue of the execution of his will, not by the probate of it. The law of this state only prohibits them from exercising any authority unless named in the letters testamentary (2 *R. S.* 71, § 15), but does not grant them any. An executor might commence an action before probate, it was sufficient if it was granted before the trial (*Osgood agt. Franklin*, 2 *J. Ch. R.* 1), and also alien the goods of the testator before probate. (*Com. Dig. Ad. B.* 9; *Valentine agt. Jackson*, 9 *Wend. R.* 303.)

The administrator with the will of the decedent annexed, is a mere substitute by the law for an executor or trustee dead, incapable of acting or declining to act, or to supply his omission, appointed by the tribunals of his testator's domicile to carry out such will, which right necessarily follows that of probate. His authority must then become coextensive with that of the executor whose place he takes. This is recognized by the common law (*Dominick agt. Michael*, 4 *Sand. S. C. R.* 410, 414; *Edgerton Ad. agt. Conklin*, 25 *Wend. R.* 233; *Beekman agt. Bronson*, 23 *N. Y. R.* 303), and declared by statute (2 *R. S.* 72, § 22). His title equally relates back to the death of the decedent. (*Com. Dig. Ad. B.* 10; *Valentine agt. Jackson*, *ubi sup.*; *Babcock agt. Booth*, 2 *Hill's R.* 181.)

The personal estate of a decedent, with the title to which his executor or administrator with the will annexed is vested, may consist of chattels, debts due to the decedent, either not evidenced in writing, or choses in action evidenced by writing. A foreign executor or administrator need not produce his letters in order to bring an action for the recovery of chattels converted (*Valentine agt. Jackson*; *Babcock agt. Booth*, *ubi sup.*), except to prove his title on the trial, if contested. The right of possession draws to it in contemplation of law, the constructive possession

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invaded by the wrong doer (*Smith agt. Miller*, 1 *Term R.* 480, *per ASHURST, J.*), and there is no need of stating the mode of acquiring title. So in actions upon choses in action negotiable by delivery, the same rule prevails (*Smith agt. Webb*, 1 *Barb. S. C. R.* 230).

The recognition of the transfer in lands of the right to collect the debts due a testator, to an executor or administrator with the will annexed, appointed by a tribunal of a testator's domicile, as in other states in which an action may be brought, is to be found in the discharge of a debtor who pays such debts to him (*Parsons agt. Lyman*, 20 *N. Y. R.* 112 to 115), in the liability of such executor or administrator for not collecting debts due in other countries (*Schultz agt. Pulver*, 11 *Wend. R.* 363), his authority to demand payment, and give notice of non-payment of a note in another state than that wherein he was appointed (*Rand agt. Hubbard*, 4 *Met. R.* 452), and his power already referred to, to demand and receive from ancillary administrators the product of collections made by them.

At common law choses in action not being assignable, no action could be maintained in the name of an assignee. Whenever, therefore, a foreign executor or administrator sued in his own name, it would appear in the pleadings that he was not the original owner of the claim, and the authority he proffered for his right to sue would be merely that of a foreign jurisdiction. Such an attempt would be apparently an invasion or usurpation of authority on the part of such jurisdiction, in order to confer a right only to be derived from domestic tribunals. The court could not investigate, preliminarily to bringing the action, the questions incident to such right, and conferring such jurisdiction as domicile and the like. A profert of the probate or letters was requisite. The court was not to be presumed judicially acquainted with foreign laws, seals, forms and signatures, so as to determine by mere inspection the authenticity of the evidence of authority. It was not, therefore,

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the ownership by such foreign executor or administrator of the debt or chose in action, but his authority to sue in a domestic court to recover it, which was doubted. Such is the language of all the cases, and most probably arose from the jealousy of the authority of foreign tribunals, as though they undertook to grant a power to an assignee to sue only conceded to officers appointed by domestic tribunals. The cases in this state merely followed the English authorities on this point. (3 P. W. 369; 8 Ves. R. 44.) That it rested only on such technical objections is evident, not only from the recognition of the right of a debtor voluntarily to pay such foreign executor or administrator, when he could be compelled to do so if caught within his jurisdiction (*Perkins agt. Stone*, 18 Conn. R. 270, 276), but from sanctioning sales by them of land in this state under the power in a mortgage (*Averill agt. Taylor*, 5 How. P. R. 476). Whether the same rule should prevail now, when any assignee can sue in all cases in their own name, and a profort is not necessary, need not now be considered.

The assignee, however, of a debt, or holder of a negotiable chose in action, deriving title through a foreign executor or administrator with the will annexed, merely makes the death of the original owner and the appointment of such legal representative, links in his title.

This question is fully determined in *Harper agt. Butler*, (2 Peters' U. S. R. 239), where it was held that the purchaser of a chose in action from a foreign executor or administrator, could recover in his own name in a domestic tribunal from a debtor resident within its jurisdiction. A similar doctrine was held in *Middlebrook agt. The Merchants' Bank* (24 How. P. R. 267; S. C. 14 Abb. Pr. R. 462). Indeed there does not seem any great distinction between the transfer by foreign tribunals of debts due to deceased natural persons, and those due to foreign insolvent corporations from debtors living within the state. And in the latter case a sale by the receivers or trustees has

Peterson agt. The Chemical Bank.

been held to convey the right to sue (*Hoyt agt. Thompson*, 5 N. Y. R. 320).

If the title of such foreign administrator could be at all embarrassed by any necessity of appointing a domestic ancillary officer to protect the interest of domestic creditors, it would be obviated by full proof in the case of the non-existence of any such claims.

As the ground which exclude a foreign administrator with the will annexed, from suing is purely technical, as convincing proof of a sufficient consideration for the assignment is not as requisite as if it were an evasion of a substantial objection. The plaintiff appears to have given his check for the claim, which was deposited in bank by the administrator to the credit of the plaintiff as trustee, he acting as the administrator's attorney. It was mixed with other funds, and drawn upon. The bank recognized it as belonging to the administrator. The latter in his assignment covenants that the debt can be collected. The assignment being under seal imports a consideration, and the plaintiff, if successful, may at least gain the difference of the rate of exchange between New York and New Haven, and interest on his advance. The statement of the administrator is somewhat contradictory and confused as to the condition of the funds he received, but he positively denied any interest in the action. I do not, therefore, think there was room for a jury to decide that the assignment was a sham, without any consideration.

The testator being domiciled in Connecticut, and the tribunals of that state having jurisdiction to decree probate, we are not at liberty to inquire collaterally into the propriety of the proof, or the regularity of the letters of administration. The whole of the proof is not apparently before us. The order admitting to probate recites that the testator was of New Haven. The probate court passed upon the sufficiency of the notices to the executors and next of kin, granting letters of administration. The certificates

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attached to the copies of proceedings in that case are not subject to the objections made on the trial (*Hatcher agt. Rocheleau*, 18 N. Y. R. 86), and no formal error seems to have been committed in any respect.

The motion for a new trial on the exceptions must be denied, and the plaintiff allowed to enter up judgment for the verdict with costs to be adjusted, including interest on the amount and the costs of the argument of the exceptions.

NEW YORK SUPERIOR COURT.

BENJAMIN M. LIVERMORE agt. THOMAS B. RHODES.

Where a debtor refuses to pay his note on demand, and is then told by the holder that he will be sued; whereupon the debtor threatens, "if he is sued, to turn over all his property, and that the holder will not get a cent," the property of the debtor is liable, on such threat, to an *attachment*.*

* NOTE.—In *Wilson agt. Britton* (6 Abb. 33), it was stated that "the declarations of the debtor are competent, without other proof, to establish his intention to do an act forbidden by the laws which authorize the issuing of attachments. The same rule is applicable to affidavits for the purpose of ordering an arrest." And it is very difficult to discover any good reason why the same proof of intention to do an unlawful act in cases requiring an attachment, is not applicable to proof of intention to commit a criminal act. This being so, the application of the principle involved can perhaps, be as well illustrated in cases of arrest as in those of attachment. Thus, the creditor calls upon the debtor for payment of the debt, which is refused, and the creditor threatens to bring an action to collect it; whereupon, the debtor threatens the creditor, that if he sues him, he will *knock him down*; the proof of the intent being clear, the debtor is liable to arrest for *assault and battery*. The creditor is a flour merchant, and the same demand and refusal of payment is made, and the like threat is made by the creditor to bring an action, whereupon the debtor says if you sue me on that demand, I will steal flour enough out of your store to equal the amount—proof of the intent to commit a crime being entirely clear, the debtor is liable to arrest for *larceny*. The creditor is a police officer, and requests the debtor to pay him a sum of money which he has acknowledged was due to the officer, arising out of a settlement of some criminal proceeding, and which he has frequently promised to pay, but finally refuses to pay it, and the officer threatens to bring an action and arrest him; whereupon the debtor says if you lay the weight of your finger on me, by virtue of a writ or otherwise, I will put a bullet through you before you can grab your club,—proof of the intent to commit a high crime being thus made clear, the debtor is liable to arrest for an *assault and battery upon a public officer, with intent to kill*. This is perhaps a sufficient illustration of the law in reference to the "declaration of intentions." R.R.P.

Livermore agt. Rhodes.

New York Special Term, September, 1864.

THIS was a motion to dissolve an attachment granted under section 229 of the Code. By the affidavits upon which the attachment was issued, it was claimed that the defendant on being informed, after his refusal to pay a note held by the plaintiffs, that he would be sued, threatened, if he was sued, to turn over all his property, and that the plaintiff wouldn't get a cent. This the defendant denied.

THOS. SADLER, *for the motion.*

HENDRICKSON & WHIPPLE, *contra.*

ROBERTSON, C. J. The defendant does not attempt to explain, but altogether denies the expressions imputed to him. They evidence an intention (whether from anger or any other cause is immaterial) to dispose of property so as to baffle the plaintiffs in the speedy collection of their debt, which, of course, could only be done by illegal means (*Gasherie agt. Appel*, 14 Abb. 64). Cases in which the only threat was to make merely a lawful assignment are inapplicable. Two witnesses, who are disinterested, in addition to the plaintiff, prove the use of the language charged, and it is only denied by the uncorroborated evidence of the defendant. His responsibility, character and conduct cannot disprove his utterance of such words. They might show them to be the result of excitement, but they are denied instead of being explained. The motion to dissolve the attachment must be denied, with \$10 costs.



DIGEST

OF THE

POINTS OF PRACTICE

AND

OTHER IMPORTANT QUESTIONS,

CONTAINED IN THE FOLLOWING REPORTS :

27 *Howard's Pr. R.*; 26 *New York Reports*; 40 and 41 *Barbour's R.*; and 17 *Abbott's R.*

ABATEMENT.

1. The decision in this case (16 *N. Y.* 193), reiterated; that, in a suit for partition in equity, no step can be taken, after the death of one of the tenants-in-common, without a revivor: that a sale, after his death, and after the bill had been taken confessed against him, without revivor, is void as against his heirs: that such heirs are not required to avoid the decree for sale by motion in the original suit, writ of error or appeal, but can impeach its validity in an action of ejectment for the land of their ancestor. (*Requa* agt. *Holmes*, 29 *N. Y. R.* 338.)

ACCOUNT.

1. Where a defendant relies on an account stated, if he fails to prove that it was mutually adjusted, and the balance ascertained, he may fall back upon the accounts and prove that there is, in fact, a balance due him, unless his pleading is so framed as to show that he relies solely on the account stated. A pleader, who claims on an account stated, and who refuses to furnish the items of his demand, pursuant to § 158 of the Code, should be precluded from giving evidence of such items

further than may be necessary to prove the settlement of the sum due. (*Goings* agt. *Patten*, 17 *Abb.* 339.)

ADVERSE POSSESSION.

1. Where the grantee of lands holds adversely to the grantor, the former cannot maintain an action upon the deed against the person thus holding adversely, even though the grantee has no knowledge of the adverse possession. Where L. received from W. a deed of land which was held adversely by K., and on W's refusal to bring ejectment L. commenced an action against K. and W. to establish W's legal, and L's equitable title—W. not defending: *Held*, that the action could not be maintained against K. (*Lowder* agt. *Kelly*, 17 *Abb.* 452.)
2. The possession which will avoid a deed for champerty must be under claim of a title adverse to that of the grantor, in the deed sought to be avoided. A *cestui que trust* cannot claim to hold adversely under his own trustee. (*Newton* agt. *McLean*, 41 *Barb.* 285.)

AFFIDAVIT.

See EVIDENCE, 5, 9.

See ARREST 6.

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AGREEMENT.

1. Where the complaint set forth an agreement whereby the plaintiff agreed to purchase of the defendants certain real estate—\$250 were to be paid on the execution of the agreement, and the balance on the delivery of the deed—and then set forth the following clause: "If the counsel for the party of the second part shall not find the title good and sufficient, this agreement shall be void, and the parties of the first part shall return the said \$250." (*Delafield agt. James, ante 357.*)
2. *Held*, the plaintiff having commenced his action to recover back the \$250, of the defendants, upon his counsel not finding the title good, that the defendants were concluded by the terms of the agreement from drawing in question wherein the title was insufficient. (*Id.*)
3. Where there is an agreement between two parties to submit any matter of difference between them to the decision of a third person, it is essential to a final and conclusive decision that both parties should have notice of the time and place of the hearing before such third person, unless there be something in the terms of the agreement declaring or clearly importing that such notice need not be given. (*Collins agt. Vanderbilt, 8 Bos. 313.*)
4. Where an agreement has been entered into between debtor and creditor, reciting the payment of the debtor's obligation, except a specified sum, an action by the creditor to recover such balance is properly brought upon the original obligation—not upon the subsequent agreement. (*Van Nest agt. Talmadge, 17 Abb. 99.*)
5. A receipt or release may be avoided by proof that it was obtained without consideration, or by misrepresentation, or that it was rescinded by agreement. (*Id.*)
6. An agreement made by one person, to "cancel" the indebtedness of another, to a third person, is an agreement to pay it. The agreement to cancel must be held to include a promise to do whatever shall be necessary to effect the cancellation. (*The Auburn City Bank agt. Leonard, 40 Barb. 119.*)
7. There is a class of cases in which it has been held that an instrument which is apparently the personal obligation of the one by whom it is signed, may, by parol, be shown to be the obligation of another, for whom the person signing was acting as agent. But the rule applies, it seems, exclusively to cases in which it appears in the body of the instrument, or from the signature of the person by whom it is executed, that he was acting for another, and intended to bind such other, and not himself personally. (*Id.*)
8. In such cases, where the party to whom the obligation is given understands the character in which the party giving it is acting, parol evidence may, it seems, be given to show that the maker, or obligor, was acting in the matter as agent merely. (*Id.*)
9. But where there is nothing of that kind either in the body of the instrument or attached to the signature, to indicate that it was intended to be any thing other than a personal obligation, such evidence is inadmissible. (*Id.*)
10. A promise, by one person, having no other inducement or consideration than the naked promise of another to do in a few days what he is, in law, bound to do *instantly*, is considered as an agreement simply, a *nudum pactum ex quo non oritur actio*. So held where F. being sued by B. for rent, promised to pay the amount actually due in a few days, if B. would discontinue the suit; whereupon B. promised to discontinue it. (*Farrington agt. Ballard, 40 Barb. 513.*)
11. *Held*, also, that no action on the case would lie against B. for fraud, upon his failure to perform his promise to discontinue the suit, and going on with the suit and recovering judgment therein. F.'s remedy was by a direct action to set aside the judgment, on the ground that it was fraudulently obtained; that he could not pay the judgment and then sue and recover the damages occasioned by the fraud, inasmuch as that would involve the necessity of inquiring collaterally into the fairness and validity of the former judgment. (*Id.*)
12. As a general rule, a party, in order to recover upon a bond or agreement to indemnify and save harmless, must prove actual damage. The money must be paid, and it must be made to appear that some injury has accrued to the plaintiff. (*Wright agt. Whiting, 40 Barb. 235.*)

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13. A. made an arrangement with H. & Co., whereby he was to make deposits with that firm which were to be subject to his drafts, &c., at his pleasure and on demand, and the firm were to allow interest on the deposits, and charge interest on the drafts, at the rate of five per cent. per annum. Under this arrangement A. made sundry deposits. He died July 5, 1856. H. & Co., on the 24th of February, 1860, paid to A.'s administrators the principal of the deposits and interest calculated to July 5, 1856, at five per cent. per annum. *Held*, 1. That the effect of the agreement was to give H. & Co. the right to use the money till called for, and they agreed to pay interest till the money was withdrawn; and until that event they were at liberty to use the principal. 2. That the death of A. did not necessarily put an end to the contract, but H. & Co. were at liberty to use the principal after that event the same as before. (*Watts* agt. *Garcia*, 40 Barb. 656.)

See ATTORNEYS, 1, 2, 3, 4, 5, 6, 7, 8.

See CONTRACT.

See EVIDENCE, 11, 12, 13.

See PARTNERSHIP, 7, 8, 9.

See SLANDER, 1, 2, 3, 4.

See SPECIFIC PERFORMANCE, 1, 2, 3, 4.

AMENDMENT.

1. There is no authority or power in the court to permit an amendment of a complaint by inserting the addition of an independent cause of action, inconsistent with the original. To wit: to an action on premium notes given to a mutual insurance company, to recover assessments thereon, the addition of a further cause of action or count on the notes as original formation or stock notes; especially when these notes would be barred by the statute of limitations, unless saved by being incorporated in the old action. (*Sheldon* agt. *Adams*, ante, 179.)
2. It has been stated in several cases that amendments will be allowed, even though the effect be to change entirely the cause of action or defence. But there is no case in which it has been decided that an amendment may be made by adding a distinct and independent cause of action, inconsistent

in all its material bearings with that already stated in the complaint. (*Id.*)

3. An order of the court allowing the amendment of a complaint of an additional, independent and inconsistent cause of action, is reviewable on appeal, on the grounds of want of jurisdiction to make it, and as involving a substantial right. (*Id.*)

See REFERREES AND REPORTS, 11.

See NEW TRIAL, 5.

See LANDLORD AND TENANT, 4, 5, 6, 7.

ANSWER.

1. Before the Code, a payment after suit brought had to be pleaded specially in bar of the further continuance of the action, and not in bar of the action generally—the plea was required to have a formal conclusion. The Code has abrogated the necessity for any prayer or formal conclusion; and an answer which sets up payment specially, after suit brought, is good, although it demands that the complaint be dismissed, and judgment for costs. (*Bendit* agt. *Annesley*, ante 184.)
2. In an action on a promissory note, where the defendant on the second day after the action is commenced pays the full amount of the note, interest and protest, which is received and kept by the plaintiff, he cannot afterwards recover his costs. If the plaintiff meant to insist on the payment of the accrued costs, he should have refused to receive the payment of the debt unless the costs were also paid. The payment of the principal—the debt, extinguishes the incident—the costs. (*Id.*)
3. Where an injunction is granted on an order to show cause, before answer, the defendant is not precluded on the coming in of the answer, from moving to dissolve the injunction upon the answer, although he appeared and opposed the granting of the injunction upon the matter of the complaint and the moving papers alone. (*Hazard* agt. *The Hudson River Bridge Company*, ante 296.)
4. An answer setting up the non-joinder of parties alleged to be necessary complainants in an action on contract, may be sustained by proof that some of the persons named for this purpose are parties in interest. The defect of proof in not showing that all those named are such, presents a case of va-

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- riance only, and may be disregarded at the trial unless the plaintiff has been misled. (*Fowler* agt. *Atlantic Mu. Ins. Co.* 8 Bos. 332.)
5. An answer averring that plaintiff is not, but that another person is, the real party in interest in the action, is not frivolous. (*Tamisier* agt. *Cas-sard*, 17 Abb. 187.)
 6. In an action upon a judgment in another state, sufficient evidence of the falsity of the answer denying knowledge or information sufficient to form a belief as to the recovery of the judgment, and the jurisdiction of the court which rendered it, is shown by the defendant's appearance in the original action, and a certified copy of the judgment record in the absence of affidavits on the part of the defendant. (*Beebe* agt. *Murray*, 17 Abb. 194.)
 7. An answer, alleging that a judgment relied on by the plaintiff was obtained by fraud and collusion between the parties named, is sufficiently definite and certain, without specifying the acts alleged to constitute such fraud and collusion. (*Oliver* agt. *Hollister*, 17 Abb. 405.)
 8. The complaint charged that the plaintiff, as the treasurer of a corporation, acting under the direction of its directors, expended \$300 in its behalf over and above his receipts from its funds, and that the corporation was justly indebted to him in the sum of \$700. Answers: 1. A denial of knowledge or information that the corporation was indebted in the sum of \$700 or any other sum; 2. That the plaintiff was instructed by resolution of the directors to expend the earnings of the corporation which should come to his hands, and no more; and that, with knowledge of the amount of earnings and of such resolution, he made further advances in his own wrong: *Held*, that the answers did not admit, but denied, that the sum of \$800 was expended by direction of the corporation. (*Simmons* agt. *Steele*, 26 N. Y. R. 264.)
 9. The first answer, *it seems*, is not a mere denial of a legal conclusion, but is equivalent to *nil debet*, and put the plaintiff to proof of his cause of action. If insufficient, it was too late to object at the close of the trial. Where an objection is thus reserved, the parties must stand on the pleadings and evidence taken together, and the court should disregard the defect in plead-
 - ing, or order the requisite amendments, *per SELDEN*, J. (*Id.*)
 10. The second answer put in issue the plaintiff's authority to make the expenditures. It is no objection that it also set up new matter not needed as the foundation of the denial, nor abridging or qualifying it. (*Id.*)
 11. Section 399 of the Code of 1862 did not prohibit a party sued by an administrator from testifying to a conversation heard by him between the deceased and a third person. Such hearing is not a transaction between the deceased and the witness. Nor is such evidence prohibited by the Code of 1862, *per ROSEKRAANS*, J. (*Id.*)
 12. The admission of one of the defendants is inadmissible to charge others with whom he is sued, to enforce their personal liability as stockholders of an insolvent corporation. Their liability is several, and not joint, *per ROSEKRAANS* and *SELDEN*, JJ. (*Id.*)
- See USURY, 1.
 See INJUNCTION, 2, 3, 4, 5, 6, 7.
 See PARTIES, 1, 2, 3.
 See DIVORCE, 7.
 See WAIVER, 5.
 See IRRELEVANT AND REDUNDANT MATTER, 1.
 See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.
 See PARTNERSHIP, 3.
- APPEAL.
1. The costs to the appellant, under § 371 of the Code (as amended in 1862), does not depend upon the sole fact that he has recovered a more favorable judgment, but whether his notice of appeal was sufficient. (*Forsyth* agt. *Ferguson*, ante 67.)
 2. The extension of the time to file and serve exceptions, or to serve a case with exceptions, does not also extend the time to serve a notice of appeal. Nor does the extension of the time to appeal, *per se* extend the time to file and serve exceptions, or to serve a case with exceptions. (*This is adverse to Sherman* agt. *Wells*, 14 How. 522, and *Jackson* agt. *Farritt*, 33 Barb. 645.) (*Sallis* agt. *Butler*, ante 133.)

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3. The court has no power to extend the time to appeal from the special to the general term, after the statute time to appeal has expired. (*The several reported cases on each side of this question examined.*) (*Id.*)
4. The county court (by the judiciary act of 1847) has the same power as the late court of common pleas had to incorporate a bill of exceptions or a case and exceptions into a judgment roll, in an action brought into that court by appeal from a justice's court. And the supreme court, on appeal from such judgment of the county court, can review any errors brought up by the record, including those, of course, which are contained in the case or exceptions. (*Monroe agt. Monroe, ante 208.*)
5. It seems that a motion to dismiss an appeal on the ground that the appeal was brought after the time allowed by law for bringing appeals had expired, may be waived by laches in moving. (*Stevenson agt. McNitt, ante 335.*)
6. Although an original process stamp may be necessary on a notice of appeal from a justice's court to the court of common pleas, yet notwithstanding section 95 of the act of congress, July 1, 1862, which provides that every instrument, document or paper, not stamped according to schedule B, should be invalid and of no effect, an appeal will not be absolutely void where such a stamp has not been preliminarily affixed to it, provided the court considers that the appeal was taken in good faith. In such a case, where it appears that the appellant had through mistake, omitted to do some act necessary to perfect the appeal, they will, under section 327 of the Code, allow the appellant to perfect his appeal by affixing the stamp on it even in open court. (*Whitney agt. Leeds, ante 378.*)
7. The respondents, on appeal, are entitled to the benefit of any presumption which will uphold their judgment, in the absence of evidence properly in the case, upon the point in question. Thus, on appeal from a judgment in which the validity of a married woman's contract is involved, if it does not appear from the evidence in the case, that she was the wife of the person with whom the contract was made, the appellate court will, in support of the judgment presume that she was not his wife. (*Lee Bank agt. Satterlee, 17 Abb. 6.*)
8. An appeal from a judgment where there has been a trial before the judge and a jury at the circuit, lies upon the law, and only on exceptions taken. A review upon the facts cannot be had at general term. Where the trial has been by the court or referees, an appeal can be taken to the general term directly, so as to obtain a review of both the facts and the law. (*Lobach agt. Hotchkiss, 17 Abb. 88.*)
9. An objection taken at the trial, that a complaint does not state facts sufficient to constitute a cause of action, is not available on an appeal from the judgment, where the defect is supplied by evidence at the trial. (*Morton agt. Pinckney, 8 Bos. 135.*)
10. The exclusion of evidence, irrelevant and immaterial as the case stood, when offered, is not sufficient cause for reversing a judgment, even though it would have been pertinent to the case as subsequently developed, and its rejection then would have been erroneous. (*Heroy agt. Kerr, 8 Bos. 194.*)
11. A refusal of the court to pass upon a question of fact not presented by the pleadings, in an action tried by the court, is not the subject of an exception reviewable on an appeal from the judgment, if the court is not requested to pass upon it before the trial has been concluded and the decision filed. (*Id.*)
12. If the court omit to specify in its statement of the facts found, a decision of every material question of fact presented by the pleadings, it will not justify a reversal of the judgment, where the case, on the appeal, fails to show affirmatively any erroneous decision of fact or of law. (*Id.*)
13. Every intendment will be in favor of the accuracy of the decision of the court upon questions of fact within the issue, when there is nothing in the case opposed to the justice of such intendment. (*Id.*)
14. To entitle an appellant to a reversal, on the ground that the finding of the referee is against the weight of evidence, it is not enough that he satisfies the appellate court that, upon the testimony as it appears in the printed case, assuming the witnesses on his behalf are entitled to full credit, they would have come to a different conclusion of that of the referee. His case

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- must be very clear and substantially without contradiction ; otherwise the finding of the referee, like the verdict of a jury, will be held conclusive. (*Morris* agt. *Second Av. Railroad Co.*, 8 Bos. 679.)
15. An appeal to the general term from a judgment of the special term, under § 348 of the Code, may be taken without giving any undertaking. The undertaking is only necessary, where it is proposed to stay the proceedings. (*Davis* agt. *Duffie*, 8 Bos. 691.)
 16. An appeal from a judgment, with the security required to effect a stay of proceedings, suspends proceedings supplementary to execution upon the judgment; but the judge has no power to dismiss such proceedings before him, on that account. (*Cowdrey* agt. *Car-penter*, 17 Abb. 107.)
 17. On appeal from an order proper to be granted only as a matter of favor, the court at general term, in support of the order, will presume, till the contrary appear, that it was so granted. (*Leighon* agt. *Wood*, 17 Abb. 177.)
 18. A party cannot claim the benefit of a judgment, and at the same time appeal from it. (*Kelly* agt. *Bloom*, 17 Abb. 229.)
 19. Where the judge at the trial at the close of the plaintiff's evidence ruled without objection, that the proof offered showed that the plaintiff sought to recover for a false imprisonment, although from the form of the complaint it seemed uncertain whether the damages were claimed for a malicious prosecution or a false imprisonment: Held, that the case must be treated on appeal as an action for false imprisonment. (*Von Latham* agt. *Rowan*, 17 Abb. 287.)
 20. An order of the city court of Brooklyn denying a motion for a new trial is reviewable on appeal. (*Suydam* agt. *Grand St. &c., Newtown R. R. Co.*, 17 Abb. 304.)
 21. On an appeal from an order requiring a pleading to be made more definite and certain, the proper course of suspending the operation of the order pending the appeal, is by a stay of proceedings, not by an extension of the time for an amendment. (*Culver* agt. *Holmster*, 17 Abb. 405.)
 22. After an appeal has been taken from a judgment, a case is made and settled, and the parties appear to argue the appeal upon the case, no objection taken for irregularity, leave will be given to enter *suave pro tunc*, an order refusing a new trial. (*Gurney* agt. *Sharp*, 17 Abb. 410.)
 23. An order of the court requiring a plaintiff acting in a representative capacity to give security for costs, under the Code (§ 817) is not appealable, except for irregularity in granting or refusing it. (*Bolles* agt. *Duff*, 17 Abb. 448.)
 24. An appeal by the plaintiffs from a judgment in their favor, is not waived by their acceptance from the defendants of the amount of the verdict in favor of the plaintiffs, with costs. (*Benkard* agt. *Habeck*, ante 391.)
 25. The plaintiffs are obliged to enter up a judgment in order to bring an appeal. That judgment becomes a debt of record, having the like incidents as other debts, including its bearing interest. It does not merge the original claim, unless the litigation ceases there, by the appeal being unsuccessful. A tender and refusal is as effectual as a payment and receipt of moneys to stop interest. There is no principle by which a party is to be absolutely barred from litigating his claim for a larger sum than that paid, merely because he accepts part in order to prevent a loss of interest, if he turns out to be wrong. (*Id.*)
 26. When the supreme court, at general term, affirms a judgment, any finding of facts, contradictory or supplementary to that of the referee or judge who originally tried the case, is unauthorized and disregarded by this court. (*Phelps* agt. *McDonald*, 26 N. Y. R., 82.)
 27. Accordingly, where a referee omitted to find anything in respect to the allegations of a counter-claim set up by the defendant, and the supreme court, at general term, affirming the judgment, found the facts stated in the counterclaim for the purpose of enabling the defendant to raise a question thereupon, this court declined to look into such supplementary finding. (*Id.*)
 28. Upon an appeal from the decrees of a surrogate on an application for letters of administration, the supreme court is to review the determination upon the proofs before the surrogate. It cannot receive further evidence or award an issue to be tried by jury at

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circuit. (*Devlin* agt. *Patchin*, 26 N. Y. R. 441.)

29. The power of the supreme court to award an issue is confined, it seems, to appeals from decisions admitting, or refusing to admit, a will to record or probate. (*Id.*)

30. The surrogate, in proceedings before him, may award costs to be taxed, but he has no power to make an arbitrary allowance for counsel fees; and such counsel fees as may be taxable are to be allowed to the party, and not to his counsel. (*Id.*)

31. The omission to give an undertaking or security, upon an appeal from the special to the general term, is not a sufficient ground for a motion to dismiss the appeal. (*Kitching* agt. *Diehl*, 40 Barb. 433.)

32. An appeal without security is effectual, under section 348 of the Code, but it does not *per se* operate as a stay of proceedings on the judgment. The case of *Kelsey* agt. *Campbell*, (38 Barb. 238), explained as relating to the effect of an appeal from the supreme court to the court of appeals. (*Id.*)

See REFERENCES and REPORTS, 4, 9.

See COUNTY COURTS, 3, 4, 5, 6, 7.

See MORTGAGE OF CHATTELS, 3.

See JUSTICES' COURTS, 6, 7, 8, 13.

See CRIMINAL LAW, 6, 7, 8, 9.

See EXECUTION, 2, 3, 4, 5.

APPEARANCE.

1. A general appearance of a defendant cures an irregularity in the summons; e. g., an indorsement upon it referring to the statute under which the action is claimed to have been brought. And the effect of the appearance is the same, although the defendant did not know of the irregularity when he appeared. (*Sprague* agt. *Irwin*, ante 51.)

See JUDGMENT, 5.

See JUSTICES' COURTS, 25, 26, 27.

ARBITRATION.

1. The submission to arbitration of any claim to a freehold in real estate, being prohibited by statute, is not merely voidable, but is void and incapable

of ratification. (*Wiles* agt. *Peck*, 26 N. Y. R. 42.)

ARREST.

1. A defendant continues liable to arrest, in a proper case, until the litigation ends in a judgment, which finally determines the rights of the parties in the action. After a judgment has been vacated, on the application of the defendant, with leave to answer, it is no longer to be regarded as a judgment within the meaning of §183 of the Code, which authorizes orders of arrest to be made only before judgment. (*Mott* agt. *Union Bank*, 8 Bosw. 591.)

2. An order of arrest may be made returnable within a specified time after the arrest of the defendant. It is not essential to name a day certain. (*Continental Bank* agt. *De Mott*, 8 Bosw. 696.)

3. To justify an order of arrest for fraud in obtaining credit, the affidavit must state the particular representations made, and in what respect they were false. A general allegation of falsity is not enough. (*Draper* agt. *Beers*, 17 Abb. 163.)

4. An order of arrest may be granted against a debtor in an action to recover moneys received in a fiduciary capacity, although the action seeks incidental equitable relief against transferees of the trust fund. (*Chaine* agt. *Coffin*, 17 Abb. 441.)

5. After a trial by the court, and a decision directing judgment for money, on the ground that it was received in a fiduciary capacity, the court refused to vacate an order of arrest which had been granted on the same ground. (*Id.*)

6. It is erroneous to vacate an order of arrest merely because the copy affidavit served contains no signatures of the affiant, or of the officer before whom the affidavit was sworn to. If no copy or paper purporting to be a copy of the affidavit is served by the sheriff, on arresting the defendant, the omission is an irregularity only, and will not entitle the defendant to his charge. The provision of the Code requiring the sheriff to deliver a copy of the order and affidavit to the defendant, on arresting him, is merely directory. (*Barker* agt. *Cook*, 40 Barb. 254.)

See CAUSE OF ACTION, 3.

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ASSIGNEE.

1. In an action of *trover* for the conversion of personal property, by an assignee of the claim, the plaintiff's proceedings will be *stayed on motion*, until payment of a prior judgment of non-suit for costs, obtained by the defendant against the plaintiff's assignor for the *same cause of action*.
2. The rule is the same in personal actions as in actions to recover real property. (*Richardson* *agt. White*, ante, 155.)
3. One who takes an assignment of the interest of the vendee in a contract for the sale and purchase of land, and enters into possession, is not personally liable to pay the moneys thereafter to become due on the contract, without an agreement to pay them, express or implied. (*Adams* *agt. Waldhame*, 40 *Barb.* 225.)
4. But where, by the terms of the written agreement by which a vendee assigned his interest in the contract to another, the assignee expressly agreed to "assume the payment of a claim of \$312 and interest to the heirs" of the vendor; *Held*, that it was fairly to be presumed that the claim thus referred to was the purchase money unpaid upon the contract; it not appearing that the vendee was otherwise indebted to the vendor, or his heirs. And that upon such promise the heirs of the vendor might maintain an action against the assignee, and recover the amount which he had agreed to pay. (*Id.*)
5. Where the contract of sale expressly provides that all payments shall be made previously to the execution of the deed, it is not necessary for the vendor to convey, or offer to convey, before bringing suit. (*Id.*)

See *BANKS*, 5, 6, 7, 8, 9.

See *COMPLAINT*, 13, 19, 20.

See *MORTGAGE*, 1, 5, 6, 7.

See *EXECUTORS AND ADMINISTRATORS*, 4.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. A provision in an assignment for the benefit of creditors, giving to an assignee, who is a *lawyer*, directions that "the assignee shall first pay and disburse all the just and reasonable expenses, attorney's fees, costs, charges and commissions of making, executing and carrying into effect the assignment," does not authorize any other or different compensation than such as is legal and just. (*Irell* *agt. Dalrymple*, ante 137.)
 2. That is, the provision for the payment of "attorney's fees," although the assignee is an attorney and counsellor at law, does not invalidate the assignment. (*Id.*)
- (As an original question, it would seem to be very difficult to distinguish this case in principle from *Nichols* *agt. McEwen*, 17 *N. Y. R.* 22, where the assignment was pronounced void by reason of providing payment to an assignee, who was a lawyer, "a reasonable counsel fee."—*Rep.*)
3. An assignee of a lease, though the assignment made to him is for the benefit of creditors of the assignor, if he enter into possession of the demised premises and use them as a part of the assigned estate, is liable for rent accruing during such occupancy. (*Morton* *agt. Pinckney*, 8 *Bow.* 185.)
 4. Where a lessee of an unexpired term, assigns his property for the benefit of his creditors, and the assignment does not disclose the existence of his lease, and it does not appear that the assignee at the time of accepting the assignment was aware of such a lease, the assignee does not become liable for subsequently accruing rent, by the fact that he enters on the premises for the purpose of taking possession of the goods assigned, without any act manifesting an intent to accept the term. (*Lewis* *agt. Burr*, 8 *Bow.* 140.)
 5. Where a judgment creditor commences an action against his debtors and their assignees, and obtains a judgment declaring the assignment void, and that the assets be applied in payment of his claim, and appointing a receiver, he has an equitable lien upon the assets which dates from the commencement of the action. And this is so, even where no injunction was issued. (*Field* *agt. Sands*, 8 *Bow.* 685.)
 6. An assignee for the benefit of creditors represents, in his capacity as assignee or trustee, all the creditors of the estate, and they are not necessary parties to an action for a payment out

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- of the fund. (*Matthaeus agt. Dwyer*, 17 Abb. 256.)
7. An assignment for the benefit of creditors provided for a preference to those named "in the annexed schedule," and such schedule was not made till two days after the delivery of the assignment, evidence appearing of entire good faith on the part of the assignor and assignee, *held*, that both the assignment and schedule were valid. (*Hotop agt. Neidig*, 17 Abb. 332.)
8. Where a complaint is framed to set aside an assignment merely on the ground of fraud, it is not competent for the plaintiff, on a failure to obtain the principal relief, to insist on a judgment settling the construction of the assignment. (*Id.*)
9. If an assignment for the benefit of creditors is fraudulent as against creditors, that will not affect the title of a purchaser of the assigned property, if he was not connected with the fraud, and was in fact a purchaser in good faith, and for a valuable consideration, without notice of the fraud. (*Sheldon agt. Stryker*, ante 387.)
10. The fact that the assignees immediately after the acceptance of the assignment, refused to take possession of the entire property, does not deprive them of their rights under the assignment, or relieve them from their obligations under it. (*Id.*)
11. An assignment, in trust for the benefit of creditors, of "all the goods, chattels," &c., "and property of every name and nature whatsoever" of the assignor, stated to be "more particularly enumerated and described in a schedule" annexed to the assignment, marked A, operates to transfer to the assignee property not mentioned in the schedule. (*Turner agt. Jaycox*, 40 Barb. 164.)
12. A provision, in an assignment executed by partners, for the payment of the private and individual debts of the assignors, out of the residue of the net proceeds of the assigned property, remaining after the payment of all the debts of the partnership, furnishes no evidence of an intention to hinder, delay or defraud creditors. (*Id.*)
13. The legal intendments are all in favor of the validity of assignments in trust for the benefit of creditors, the same as in respect to other instruments, it seems. (*Id.*)
14. Where partners assign their joint property only, the assignment only showing on its face that the partnership is insolvent, not that either of the partners is so individually, there is no presumption of law that either of the partners was individually insolvent, or that their interests in the partnership property, or the amount of their private debts were unequal. (*Id.*)
15. Where property, debts and demands are transferred and assigned by partners to their creditor to hold as security for his debt and as his indemnity against an indorsement, the title to the property, &c., vests in the creditor, with the right of possession and absolute dominion over it, subject only to the right of the assignors to redeem. And if the creditor intrusts such property, debts and demands with the partners, to sell and collect the same, as his agents and factors, and pay over the proceeds to him, they do not become liable, upon a sale of the property by them, as tortfeasors, as upon an unauthorized disposal thereof, so as to authorize an action of trover against any of them alone. Their liability rests upon contract, and not on tort, and is necessarily joint, and not several. (*Harris agt. Schultz*, 40 Barb. 325.)
16. Hence an action for the refusal of the debtors to account for and pay over the proceeds of property sold by them must be brought against both; and if brought against one only, the objection of the non-joinder of the other is properly taken by demurrer. (*Id.*)
17. Voluntary transfers of personal property, where in point of fact the situs of the property itself may be, are controlled and regulated by the law of the owner's domicile, and if valid there to transfer a title, are valid everywhere else. A voluntary assignment of property, by a debtor, for the benefit of his creditors, stands in this respect upon the same footing, and the assignees are entitled to assert the same rights as purchasers in any other form from the original owner. (*Ackerman agt. Cross*, 40 Barb. 465.)
18. It being the duty of an assignee under an assignment to him in trust for the benefit of creditors, to take care of and protect the assigned pro-

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party, he may maintain an action of trespass against any person who interferes therewith. (*McQueen agt. Babcock, 41 Barb. 337.*)

19. The bringing of such an action by the assignee, against one who assumes to take the assigned property out of his possession, is in furtherance of his duty, and hence is not an intermeddling with the property improperly, or within the sense and meaning of an injunction order prohibiting him from "intermeddling with, receiving or collecting" any of the property of the assignor. Such an injunction is no bar to a suit against the sheriff, for taking the assigned property out of the hands of the assignee; and if suit is not brought within three years, the statute of limitations will be a good defence. (*Id.*)

See FRAUDULENT TRANSFER OF PROPERTY.

See SUPPLEMENTARY PROCEEDINGS, 2, 3.

ATTACHMENT.

1. A creditor will not be allowed to suffer a deed to stand as conclusive evidence of the grantee's ownership of the land, and seize by attachment or execution the fruits of it, produced by the industry of such grantee as the personal property of the grantor, and contest the validity of the conveyance of the land in an action brought against him for such taking. (*Garbutt agt. Smith, 40 Barb. 22.*)
2. Proceedings by attachment against executors are inapplicable for the purpose of compelling the settlement of the estate of the testator, or of enforcing payment by the executors of an individual demand contracted by the testator, where the executors are not charged with any breach of duty, except a neglect to pay the debt. (*Metcalf agt. Clark, 41 Barb. 45.*)
3. A sheriff acquires a lien upon property levied upon by him under attachment, which constitutes a qualified or special title. He is thereby authorized to take and hold possession until the demands for which the attachments were issued are paid, or until judgment and a sale of the property seized. (*Rhoads agt. Wood, 41 Barb. 471.*)
4. If property levied on under an attachment is taken out of the hands of the sheriff, a reasonable sum for the expenses of regaining the possession will follow the lien of the sheriff, as an incident to the performance of his duty, and to that extent he may insist upon being repaid, if he acquires possession in a lawful manner. (*Id.*)
5. It is now the settled law of this State that a prior assignment in bankruptcy, or under insolvent proceedings in a foreign nation, or in another State of this Union, will not be permitted to prevail against a subsequent attachment of the bankrupt insolvent's effects by a creditor residing here. (*Kelly agt. Crape, 41 Barb. 603.*)
6. Where a debtor refuses to pay his note on demand, and is then told by the holder that he will be sued; whereupon the debtor threatens, "if he is sued, to turn over all his property, and that the holder will not get a cent," the property of the debtor is liable, on such threat, to an attachment. (*Livermore agt. Rhodes, ante, 506.*)

See BANKS, 5, 6, 7, 8, 9.

See SUMMONS, 7.

ATTORNEYS.

1. It is a well settled elementary principle of law, that the party employing an attorney or counsellor at law to perform any service in his professional capacity, in the absence of a special agreement to the contrary, is personally responsible for any such services rendered. (*Bowman agt. Tallman, ante 212.*)
2. The general rule is, that the party employed looks to the employer for payment; and when a trustee or guardian employs an agent or attorney in the execution of his trust, such agent or attorney must look to the person employing him, *individually*, for his payment, and can have no claim on the trust fund. (*Id.*)
3. Where the defendant was the general agent of the property of an estate, and acted for all the heirs, and had previously been a client of the plaintiff who was an attorney and counsellor at law, and employed the plaintiff to do business for the infants and non-resident heirs, who were irresponsible parties, without suggesting or agreeing not to become individually responsible for the same; or without notifying the plaintiff he would not be responsible; and this, taken together

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with the fact that defendant controlled the entire business, funds, and all the other concerns of the estate, was sufficient to establish his *personal responsibility* to plaintiff for his services claimed. (*Id.*)

4. Where the plaintiff, an attorney and counsellor at law, was employed by the defendant, an agent of all the heirs to an estate, to take such proceedings as the plaintiff should deem proper for the payment and extinguishment of a heavy assessment upon their real estate; and after an examination of the will of the testator in reference to the property, he advised that it be *sold under the statute* for the benefit of the infants, who, under the provisions of the will, were entitled to the property in fee, after the extinguishment of certain life estates; and such proceedings were thereupon instituted and a sale thereunder made, but which proved ineffectual to convey a valid title to the purchaser, inasmuch as the special and general terms of the supreme court denied a motion to compel the purchaser to take the title, on the ground that such sale did not cut off or affect the rights or interests of *unborn children*, who might be eventually entitled, under the provisions of the will, to an interest in the real estate in question:
5. *Held*, that the plaintiff was entitled to *compensation for his services* in such proceedings and sale, notwithstanding that after such decision of the supreme court he abandoned the proceedings, and commenced proceedings in *partition*, which resulted in procuring a sale and the confirmation thereunder of the title to the property in the purchaser. (*Id.*)
6. There is no *implied agreement* in the relation of counsel and client, or in the employment of the former by the latter, that the former will guaranty the success of his proceedings in a suit, or the soundness of his opinions, or that they will be ultimately sustained by the court of last resort. (*Id.*)
7. But *it seems* that in this case the plaintiff was right in advising the proceedings first undertaken to sell the property under the statute. The statute was intended to furnish a cheap and prompt mode of selling infants' estates, where such sale is necessary. If the statute does not apply in such

a case, it fails of its object, in a case calling most pressingly for its action. (*Id.*)

8. *Infants unborn are not seized*, hence courts cannot sell their interests because such interests do not exist; they can sell only interests existing. If a child should be born, it will be vested with the interest in the *share substituted for real estate* and held by its co-heirs. (ROBERTSON, *J. dissenting.*) (*Id.*)
9. The employment of attorneys other than the corporation counsel to represent the city of New York, is valid. The consent of the corporation counsel to the employment of other attorneys, by the city of New York, gives them, when so employed, full power to represent the city as such attorneys. (MACOMBER *agt. Mayor, &c. of New York*, 17 Abb. 35.)
10. An attorney has a *lien on a judgment* recovered by him for his services in the prosecution or defence of the suit in which such judgment was recovered. Before the Code, the *taxable costs* in a cause were the measure of compensation between attorney and client. (ADAMS *agt. Fox*, ante 409.)
11. Since the Code, the taxable costs are no longer the measure of compensation, the lien of the attorney is for the measure of compensation the parties may legally agree upon—either a fixed sum, or a part of the judgment when recovered, or so much as his services may be worth. (*Id.*)
12. Where the plaintiff, an attorney, brought an action against his client and the judgment debtor of the latter—such judgment debtor being an *executor*, and asked to have established by the court an *equitable assignment* of the judgment to himself from his client, to the amount that should be adjudged due from his client to him in this action; *Held*, that the judgment debtor—the executor—was not either a necessary or proper party to the action. (ALLEN, *J. dissenting.*) (*Id.*)
13. Where an agreement sought to be enforced, is made between principal and agent, or client and attorney, giving benefits and advantages to the agent and attorney, the right of action is not deemed to be established on proof of the due execution of the instrument, without clear proof, out-

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side the paper, of its integrity and entire fairness. (*Bock agt. Barnes*, 40 Barb. 521.)

14. A stipulation or agreement entered into by the counsel for the respective parties on the trial of a cause, and in the face of the court, relative to the conduct of the suit and the proceedings therein, and entered on the minutes is binding and conclusive upon the parties. (*Staples agt. Parker*, 41 Barb. 648.)

15. The rule which requires all arguments between parties and their attorneys, in respect to the proceedings in a cause, to be in writing, has no application to that class of stipulations. (*Id.*)

See WITNESSES, 21.

BAIL.

See SUMMERS.

BANKS.

1. Where a bank receives, as collecting agent, from another bank, a draft or promissory note for collection, the former bank in the absence of an express agreement or usage to the contrary, is not bound to notify and duly charge all the prior parties to the paper. Its duty is performed by giving reasonable notice of non-payment to its principal only. (*State Bank of Troy agt. The Bank of the Capitol*, ante, 57.)

2. Where a bank discounts a note for a customer, it is not liable for failing to charge a prior indorser, on the non-payment of the note by the drawer. (*Lake agt. Artisans' Bank*, 17 Abb. 232.)

3. The crediting by a bank to a dealer of the proceeds of a note which it had been induced to discount by his fraudulent representations, and the payment thereof upon his checks, do not prevent the bank from setting up the fraud by way of defence or counter-claim in his action for moneys subsequently deposited. (*Andrews agt. Artisans' Bank*, 26 N. Y. R. 298.)

4. Where such action is brought before the maturity of the note, evidence that the bank had offered to return it upon discovering the fraud is not a prerequisite to its giving proof of such fraud. Nor is it an objection that the bank was shown to have held the note and presented it for payment at ma-

turity. The latter fact, it seems, is not conclusive that it had affirmed the contract of discount. (*Id.*)

5. A bank, receiving from another notes for collection, obtains no better title to them, or the proceeds, than the remitting bank had, unless it becomes a purchaser for value without notice of any defect of title. (*McBride agt. Farmers' Bank of Salem, Ohio*, 26 N. Y. R. 450.)

6. It is not a purchaser for value by reason of its having a balance against the remitting bank, for which it had refrained from drawing, and from having discounted notes for the latter upon its indorsement, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of such collections, treating all the paper sent for collection as the property of the other, and drawing for balances at pleasure. (*Id.*)

7. The remitting bank, having demanded the notes before maturity and the proceeds afterwards, and both of them being foreign corporations, assigned its demand to the plaintiff. No new demand was necessary to enable him to sustain an action, nor is it an objection that his assignor, as a foreign corporation, could not have sued out an attachment against another foreign corporation on a cause of action not arising in this state. (*Id.*)

8. The cause of action is assignable, notwithstanding any personal disability of the assignor or the assignee to maintain an action in this state. (*Id.*)

9. It is no fraud against our statute or the defendant to assign the cause of action to a resident, to obviate the objection to an attachment by a non-resident. If it were, it lies with the defendant to prove the fraud, by showing the assignor's knowledge that the plaintiff was a resident; and it seems that the objection is waived by a full appearance to the action. (*Id.*)

10. Where money is deposited with a banker to the credit of another, the former becomes indebted to the latter for the amount, payable on reasonable demand. But if the banker by his words or conduct, denies the right of the depositor, as by placing the deposit to the credit of a third person, he thereby becomes presently liable to an action for the amount without a formal demand. (*Carroll agt. Cone*, 40 Barb. 220.)

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11. The plaintiffs deposited money with the defendants, who were bankers at Chicago, taking from them a certificate stating that the plaintiffs had deposited in their office "\$1,781.42 Ill. currency," payable to the order of themselves on the return of the certificate, *Held*, that the plaintiffs, if not entitled to specie, were at least entitled to payment in Illinois currency, receivable in the ordinary transactions of business at par; and that they were not obliged to take Illinois bills which were uncurrenct, and not received or passed as ordinary currency in the state, or capable of being used except at a depreciation of fifty cents on the dollar. (*Hulbert agt. Carver*, 40 Barb. 245.)
 12. Where an individual is a member of the board of directors and of the discount board of a bank, that fact will not, in the absence of any special authority to act as the agent of the corporation, in a particular transaction respecting the discounting or renewal of a note, authorize him to make admissions or statements concerning such transaction which will bind the bank. (*The East River Bank agt. Hoyt*, 41 Barb. 441.)
 13. A proceeding under the act of 1849, "to enforce the responsibilities of stockholders," &c., (*Laws of 1849, p. 343*), is not barred by a previous judgment recovered in an action instituted under the Revised Statutes (§ R. S. 468, §§ 39, 40), by a stockholder of the bank to compel the application of its assets to the payment of its debts. (*Divin agt. Duncan*, 41 Barb. 520.)
 14. In a proceeding under the act of 1849, to enforce the individual liability of the stockholders of an insolvent bank, for the payment of its debts remaining after its assets are exhausted—executors are properly chargeable as holders of stock which appears on the books of the bank to have been held originally by their testator and subsequently by them. (*Id.*)
 15. In absence of any proof that the charter of a bank contains any restrictions or limitations on the power of the bank to negotiate or indorse notes or bills of exchange, or on the authority of its cashier to indorse such negotiable paper for the bank, the presumption is that the bank has power and its cashier authority, to indorse paper of that description. (*Robb agt. The Rice County Bank*, 41 Barb. 537.)
 16. Though it appears that a bill was indorsed by the cashier of a bank for the mere purpose of collection, or for some other special or limited purpose, such proof will not prejudice or affect the right of a *bona fide* holder for value, before maturity, to recover thereon against the bank, unless it be proved that he took the bill with notice of such special purpose, or under circumstances requiring him to make inquiries as to the purpose of the indorsement. (*Id.*)
 17. The omission of a cashier, on indorsing a bill of exchange, to write before or after his name and the name of his office, "for the ——— bank," will not preclude the holder from recovering against the bank as indorser. An indorsement as follows: "B. P. K., cashier," will bind the bank of which B. P. K. is cashier. (*Id.*)
- See CORPORATIONS, 9, 10.
- ### BILLS OF EXCHANGE AND PROMISSORY NOTES.
1. Where a bank receives, as collecting agent, from another bank, a draft or promissory note for collection, the former bank in the absence of an express agreement or usage to the contrary, is not bound to notify and duly charge all the *prior parties to the paper*. Its duty is performed by giving reasonable notice of non-payment to its principal only. (*State Bank of Troy agt. The Bank of the Capitol, ante*, 57.)
 2. Where a promissory note is made to be used for a specified purpose and is misapplied, no recovery can be had thereon by a party receiving it as security for a precedent debt. Where the evidence upon the questions of its misapplication, and of the plaintiff's taking it *bona fide*, for value, is conflicting, it must be submitted to the jury, and their verdict will be conclusive. (*Duncan agt. Goetze*, 8 Bosw. 243.)
 3. In an action against the acceptor of a draft, a variance in stating the initial of the first name of the drawer is immaterial, and will not sustain a general denial of the complaint. The acceptor cannot defend on the ground that the drawer's signature was not his true name. Where this is the only defence, the answer, though verified and confined to a denial of the allegations of the complaint, may be struck

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- out as sham. (*Clapin* agt. *Griffin*, 8 Borew. 689.)
4. A promissory note was payable in four annual installments, or when \$50,000 should have been subscribed for the endowment of a college, the payee, at the election of the maker. The four years having expired, the payee may recover without proof of notice that the subscription was completed, or of demand of payment. (*Genesee College* agt. *Dodge*, 26 N. Y. R. 213.)
 5. The transfer of bills of exchange given for the purchase price of chattels, but not accepted in absolute payment, does not transfer to the indorsee any right of action against the vendee for the unpaid purchase money, except as they are liable on the bills. (*Battle* agt. *Coit*, 26 N. Y. R. 404.)
 6. Accordingly, where a partner sold his interest in the firm to the other members, receiving therefor bills to which some, but not all, of them were parties, *held*, that his release of the partners not liable on the bills was a defense to a suit against them for the purchase money by the indorsee of the bills. (*Id.*)
 7. The drawee of a bill had agreed with the drawer to accept for his accommodation without funds. To a bill directing the contents to be charged to the account of the drawer, in the singular number, the defendant subscribed his name as surety, it was discounted at a bank and was paid by the acceptor without funds under the arrangement with the drawer: *Held*, that the defendant was not liable to the acceptor, nor to one who, having, without the defendant's knowledge, subscribed the bill as *he* surety, reimbursed the acceptor. (*Wright* agt. *Garlinghouse*, 26 N. Y. R. 639.)
 8. The defendant cannot be made liable as for money paid to his use without evidence connecting him with some arrangement amounting to a request that the bill should be accepted for the drawer's accommodation. (*Id.*)
 9. In the absence of any such evidence, which a bill in this form does not supply, or of a contract outside the bill, the defendant is not liable, except to one who could recover against the drawer in default of the acceptor. (*Id.*)
 10. The case of *Suydam v. Westfall* (2 Denio 205), does not overrule *Griffith v. Reed* (21 Wend. 502), but was decided upon circumstances supposed to distinguish it from the latter. (*Id.*)
 11. The maker of a promissory note has the whole of the last day of grace in which to pay it. And if it be payable at a bank, an action commenced against the maker on the last day of grace, though it be after banking hours at such bank, will be prematurely brought, and the plaintiff should be non-suited. (*Smith* agt. *Aylesworth*, 40 Barb. 104; *See also* to the same effect *Oothout* agt. *Ballard*, 41 Barb. 83.)
 12. Where a draft was dated at the principal office of the railroad company, signed by the president of the company. "J. R. W., Pres't T. N. Co.," directed to and accepted by "H. W. B., Treas." of another company, and upon its face contained the direction to "charge to motive power and account:" *Held*, that it appeared upon the face of the instrument that it was, and was intended to be, the draft of the company, and not of the president individually. (*Olcott* agt. *Tioga R. R. Co.*, 40 Barb. 179.)
 13. A corporation has power to give a valid note or draft, in payment of a debt, or on the purchase of property for legitimate use. And, therefore, it can make a valid indorsement upon the notes of others, which it has received in the course of its business for the same purpose. (*Id.*)
 14. The official seal of a notary public upon his certificate of the presentment and non-payment of a promissory note, and of protest and notice, verifies the whole official recital of facts, whether in one part or more, if all are on the face of the same paper thus impressed. And it makes no difference whether the impression of the seal is at the top, middle, or bottom of the recital. (*Id.*)
 15. Where a blank space is left, in a promissory note, after the word "at," in the place where the place of payment is usually mentioned, the holder of the note is authorized by an implied authority to fill the blank. The word "at" implies that the blank space which succeeds it may be filled before the note is delivered, with a designated place of payment. And if the holder fills in a place of payment, it will not discharge the indorser. (*Kitchen* agt. *Place*, 41 Barb. 465.)

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16. Parties residing and doing business in the city of New York, there indorsed and procured to be discounted, a promissory note payable in Alabama, *held* that the indorsement was a New York contract, and governed by the laws of New York. By such an indorsement, the indorsers promise to pay the note in New York, if, upon its being presented for payment in Alabama, payment is refused, and they are duly notified of such demand of payment and refusal. (*Artizans' Bank* agt. *Park Bank*, 41 Barb. 599.)

See HUSBAND and WIFE, 4.

See COMPLAINT, 15.

See BANKS, 2, 3, 4, 5, 6, 7, 8, 9, 15, 16, 17.

See PRINCIPAL and AGENT, 7, 8.

See SURETY, 7.

See CORPORATIONS, 15, 16.

See USURY, 5.

BOARD OF EDUCATION.

1. A certificate, issued under the laws of 1851, which makes it the duty of the city superintendent, under general regulations of the board of education, to examine into the qualifications of persons proposed as teachers of common schools in the city of New York, and to grant certificates, need only specify in which class of schools the person is qualified to teach; and where a by-law of the board of education which required that the certificate given should express the grade of the teacher, the superintendent gave a certificate expressing the grade, and that the teacher was qualified as first assistant of a grammar school, *held*, that the teacher might lawfully serve as principal of the primary department of a grammar school. (*Gildersewe* agt. *The Board of Education*, 17 Abb. 201.)

2. The power of the board of trustees to employ teachers under that statute, coupled with the general authority to conduct and manage the schools, necessarily implies the right to remove them, especially under a by-law of the board of education regulating the proceedings on such removal. The power of the city superintendent, under this statute, to annul the certificate given to any teacher, is distinct from the power of the trustees to remove a teacher. (*Id.*)

3. The office of a trustee of common schools in the city and county of New York, becomes vacated by the removal of the incumbent from the county. (*Id.*)

4. The board of education of the city and county of New York may be sued; possessing the powers and privileges of a corporation, it is subject to the obligations incident to such powers. (*Id.*)

5. The board of education of the city of New York, under the statute, (1851) have no appellate jurisdiction over the trustees of common schools of that city, in the exercise of their powers to dismiss teachers, and other officers of the ward schools, and the ward primaries. (*People* agt. *Board of Education*, N. Y. ante 462.)

BONDHOLDERS.

1. *Interesting to bondholders.*—An act of the legislature of New Jersey, "to relieve the creditors and stockholders of the Somerville Water Power Company, and of the Hudson Manufacturing Company," and also a *supplementary act*, by which certain persons therein named were authorized to sell the whole of the mortgaged property at public sale to the highest bidder, free from all incumbrances, and after paying expenses and certain costs, to distribute the proceeds among the creditors according to the priorities of their several liens, *held* to be *unconstitutional and void*, as "impairing the obligation of contract," in reference to a sale made under the acts, of the property and effects of the first-named company, where there were original outstanding bonds of that company secured by mortgage on its property, due and unpaid to the mortgagees, prior to the passage of the acts. (*Martin* agt. *Somerville Water Power Co.* ante 161.)

2. For the reasons, that any legislation which defeats the estate of the mortgagee without payment or tender of the whole debt due on the bonds; which gives a preference to posterior liens, and which deprives the mortgagee of his remedy given by the covenants of his contract, as also that given by the law of the land, impairs the obligation of contract, and is contrary to the letter and spirit of the constitution. (*Id.*)

3. The act may be remedial as to the owners of the equity of redemption

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and those having liens against it, but the mortgagees have a right to say: we have never agreed to have our estate defeated to suit the convenience of others. (*Id.*)

4. The mortgage of the property and effects of the company having been given to three persons as trustees for the bondholders, the complainant as owner of a portion of the bonds, had a right to file his bill and make these trustees, together with all other parties interested, defendants; in which suit all the rights of the parties could be settled, and all equities adjusted. (*Id.*)

5. These bonds were made payable to the holder, and of course transferable without assignment or indorsement, and the possession of them is *prima facie* evidence of ownership. (*Id.*)

6. The complainant's title to four of these bonds (for \$500 each, the bonds in suit,) was not weakened by the facts that he knew at the time of his purchase that these bonds were pledged to a third person for an amount much beyond their value; that they were put into his (complainant's) hands for collection, and he advised that they should be sold, and they were taken from him for that purpose, and soon afterward returned to him with the information that they had been sold to another person for a small consideration, and the latter person then placed the bonds again in the hands of the complainant, where they remained for about five years, when the complainant purchased them as his own for \$500. (*Id.*)

7. The effect of these facts was to strengthen rather than weaken the presumption of ownership of the bonds by the complainant. (*Id.*)

8. But the complainant was not, in this suit, although commenced by him alone, entitled to carve out of the mortgaged premises sufficient to pay his bonds with interest, and leave the other bondholders to seek their remedy as they might. The latter were entitled to come in, either as defendants or petitioners for their proportion of the mortgaged premises. (*Id.*)

9. A proposition to unite the Semerville Water Power Company with the Hudson Company, specifying the terms upon which the union should be made—that all the property of both companies should be vested in the Hudson Company clear of all incumbrances,

and the business carried on under a charter of that company—the proposition to be valid if assented to by all parties therein mentioned, on or before the first day of May then next. (*Id.*)

10. Held, that this proposition, as appeared from the evidence, was not assented to by all the parties, and was therefore void after the first of May: no party who had signed that proposition could have been successfully called upon for a specific performance of the covenants or agreements contained therein, merely because he had signed it. And it appeared further, that this proposition never afterwards became an agreement or contract, and never was obligatory upon any of the parties named therein. Therefore, the bondholders of the Water Power Company never became bound to surrender their bonds to the Hudson Company. (*Id.*)

11. Persons receiving bonds issued by towns are presumed to know the law, and are bound at their peril to ascertain whether the statute, authorizing their creation, has been complied with. (*Town of Duaneburg* agt. *Jenkins*, 40 Barb. 574.)

12. If bonds are issued by a town without the consent required by the statute having been obtained, they are void, at least in the hands of the railroad company to whom they are issued, if not in the hands of every subsequent holder. (*Id.*)

BREACH OF CONTRACT.

1. Where goods are received and used by the vendee under a contract for the delivery of specified quantities in each of three successive months, the quantity delivered being less than that required by the contract, such breach is a bar to an action by the vendor for the price of the goods delivered. (*Caslin* agt. *Tobias*, 26 N. Y. R. 217.)

2. The vendee under such a contract has a right to expend the goods delivered, as required in his business, without waiting for the expiration of the month to see whether the vendor will fully perform his contract, and such use is no waiver of his defence in case of the vendor's breach of contract. (*Id.*)

See CONTRACT.

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CASE AND EXCEPTIONS.

1. The extension of the time to file and serve exceptions, or to serve a case with exceptions, does not also extend the time to serve a notice of appeal. Nor does the extension of the time to appeal, *per se* extend the time to file and serve exceptions, or to serve a case with exceptions. (This is adverse to *Sherman* agt. *Wells*, 14 How. 522, and *Jackson* agt. *Facitt*, 33 Barb. 645.) (*Sells* agt. *Butler*, ante 183.)
2. The court has no power to extend the time to appeal from the special to the general term, after the statute time to appeal has expired. (The several reported cases on each side of this question examined.) (*Id.*)
3. The county court (by the judiciary act of 1847) has the same power as the late court of common pleas had to incorporate a bill of exceptions or a case and exceptions into a judgment roll, in an action brought into that court by appeal from a justice's court. And the supreme court, on appeal from such judgment of the county court, can review any errors brought up by the record, including those, of course, which are contained in the case or exceptions. (*Monroe* agt. *Monroe*, ante 208.)

4. Where competent evidence has been received, subject to exception and to future decision as to its admissibility, an exception to this conditional admission becomes unavailable, where the final decision is in favor of retaining the evidence. (*Bihin* agt. *Bihin*, 17 Abb. 19.)

See NEW TRIAL, 1, 2, 3.

See APPEAL, 11, 12, 13.

See EXCEPTIONS.

CAUSE OF ACTION.

1. An action by a creditor, to enjoin his debtor from making an assignment or disposing of his assets to the preference of other creditors, in violation of an agreement by which he had obtained credit from the plaintiff, and to have his assets appropriated *pro rata* between the plaintiff and other creditors, does not preclude such creditor from bringing a subsequent action to recover judgment against the debtor upon the same indebtedness. The first is strictly a cause of action upon an equitable demand triable by the court; and the second

a cause of action upon a legal demand, triable by a jury. The Code does not establish any new rule of determining the identity of causes of action in this respect. (*Paige* agt. *Wilson*, 8 Bos. 294.)

2. A cause of action against a foreign corporation, as indorser of a promissory note, which by its terms is payable in the city of New York, is a cause of action arising within that city; and the superior court has jurisdiction thereof, though the plaintiff be a non-resident. (*Spencer* agt. *Roger's Locomotive Works*, 8 Bos. 612.)
3. A person who has, without bad faith, upon oath or otherwise, merely stated his case to a magistrate having jurisdiction of the offense supposed to have been committed, and of the person accused, is not liable to an action for false imprisonment upon the consequent arrest of the accused, although such arrest is not warranted by the law or the facts of the case. (*Von Latham* agt. *Rowan*, 17 Abb. 238.)

See COMPLAINT, 17, 19, 20.

See APPEAL, 19.

See MALICIOUS PROSECUTION, 1, 2, 3, 4.

CHARGE OF THE COURT.

1. Where a judge, in charging the jury, informed them that they were to say whether a witness, who was not contradicted or impeached, was mistaken in his statements of a conversation which took place twelve years before, *Held*, that the instruction was proper. (*Valton* agt. *National Loan Fund*, 17 Abb. 268.)

See FRAUDULENT TRANSFER OF PROPERTY.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. In an action for the recovery of possession of personal property, where the plaintiff recovers judgment for the value of the property, amounting to \$43.70, together with 6 cents damages for the unlawful taking, he is entitled to recover the same amount as costs; although no proceedings were taken by the plaintiff for the claim and delivery of the property under § 206 et seq. of the Code. (*Cerbin* agt. *Milton*, ante 76.)

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See STAT OF PROCEEDINGS, 1, 2.

See POSSESSION OF PERSONAL PROPERTY.

COMMISSIONERS OF EMIGRATION.

1. The commissioners of emigration are not responsible for the carelessness, negligence, misfeasances, or positive wrongs, of their agents or employees. (*Murphy* agt. Commissioners of Emigration, *ante*, 41.)

COMMISSIONERS OF HIGHWAYS.

1. In proceedings upon a common law certiorari, to review proceedings of commissioners of highways, the prevailing party is entitled to costs. (*This agrees with Haviland* agt. *White*, 7 How. P. R. 154; *People* agt. *Flake*, 14 *id.* 527; and *People* agt. *Robinson*, a third district general term decision, 1859, not reported; and is adverse to *People* agt. *Heath*, 20 How. P. R. 304. (*People* agt. Commissioners of Highways of *Schodack*, *ante* 158.)
2. Referees, appointed under the statute by the county judge, for the purpose of hearing an appeal from the decision of commissioners of highways, in reference to laying out a highway, &c., possess all the powers that were formerly possessed by three judges of the late common pleas, under the provisions of Title 1, Art. 4, Ch. 6, Part 1 of the Revised Statutes. (*People* agt. *Ferris*, *ante* 193.)
3. But such referees have no express power given under the statute, and none incidental to those expressly given, which authorizes them to open a case for a rehearing upon the merits, after the testimony is closed and the case finally submitted to them for their decision. (*Id.*)
4. It seems, that where by accident or mistake a party interested has been deprived of any hearing, or of only a partial hearing, the referees have the power, upon due notice given, to open the case for rehearing after it has been submitted. (*Id.*)
5. The commissioners of highways of a town assessed highway labor against a railroad by name, running through the town, it not appearing from the list whether the assessment was against the lands of a non-resident or against the railroad company, whose principal office was not in the town, *Held*, that

the assessment was against the corporation and not against its real estate as land of a non-resident. (*Feenler* agt. *Westervelt*, 17 Abb. 59.)

6. Where the legislature, by special statute, declares that all streets, roads and alleys, in a particular village, which have been worked and improved, and which are now used as such, shall be deemed public highways, the character of the streets, roads and alleys, whether highways or not, is thenceforth to be determined, not by the rules of the common law or the general statutes relating to highways, but by inquiring simply whether, as a matter of fact, any particular street or alley comes within the provisions of the statute. (*Hickok* agt. *Trustees of Plattsburgh*, 41 Barb. 130.)
7. Overseers of highways, acting under the general authority of the trustees of a village, who are by law commissioners of highways, without direction as to the specific application of labor, under their warrants, may create a liability on the part of the trustees, by applying the labor to the improvement of a particular street. Unless such acts of the overseers are repudiated or disavowed by the trustees, they will be presumed to have ratified them. (*Id.*)

COMMON SCHOOLS.

See BOARD OF EDUCATION.

COMPLAINT.

1. Dates are always flexible in a pleading; variances in that respect between it and the proof may be disregarded, (*Code*, §§ 169, 170, 173, 176,) and a pleading is hardly demurrable now for want of a time and place for every occurrence stated in it. A referee would not be entitled, therefore, to report against a fact, merely because its date was wrongly stated. (*Zorkowski* agt. *Zorkowski*, *ante* 37.)
2. But in actions for an absolute divorce for adultery, the complaint should allege that the discovery by the plaintiff of the defendant's criminality took place within a certain time before the commencement of the action, because, as it affects the propriety of decreeing a divorce, such time has been fixed by law, and the insertion of such allegation in the complaint is required by an absolute rule. (*Id.*)

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8. The discovery of such criminality more than *five years* before bringing suit, is made by the revised statutes a defence to the action; but the 163 rule of the late court of chancery required most of the matters constituting a defence under such statutes to be *negatived by the complainant in his or her bill of complaint*, to enable the court, by the reference to a master, to take proof of all the material facts stated therein, and report the testimony taken thereon, to ascertain whether the facts required to be denied existed or not. The 86th general rule of the supreme court, providing merely for the substitution of an affidavit by the complainant for his or her verification of the complaint, was not intended to accomplish the same purpose as the former rule, and does not repeal it. (*Id.*)
4. It may be not only bad pleading, but very embarrassing to the court, where a complaint mixes up different and separate causes of action with inconsistent prayers for relief, yet if the matters complained of arise out of a partnership transaction, the complaint may be sustained, so far as to grant an injunction and receiver. (*Davis agt. Grove, ante 70.*)
5. Thus, where the plaintiffs alleged that on a joint transaction in sugars, made between them and the defendants, the defendants 1st, had received \$1,187.49 more in value of sugars from the plaintiffs than the latter had drawn bills for, and prayed judgment for that amount. (*Id.*)
6. 2d. That the entire profits on the sugars sold by the defendants on joint account, amounted to \$20,000, and asked judgment for one-half that amount. (*Id.*)
7. 3d. That the assignment for the benefit of creditors, which the defendants had made, be set aside as fraudulent and void, as to said sugars, and the proceeds thereof, and for an injunction and receiver; and
8. 4th. For a judgment in behalf of the owners and holders of the bills of exchange, to be paid out of the avails of the sugars on hand. These latter were strangers to the action, and mere creditors of the two firms, the plaintiffs and defendants. No prayer in the complaint for an accounting between themselves as partners. (*Id.*)
9. There is no authority or power in the court to permit an *amendment* of a complaint by inserting the *addition* of an independent cause of action, inconsistent with the original. To wit: to an action on premium notes given to a mutual insurance company, to *recover assessments* thereon, the addition of a further cause of action or count on the notes as *original formation or stock notes*; especially when these notes would be barred by the statute of limitations, unless saved by being incorporated in the old action. (*Sheldon agt. Adams, ante 179.*)
10. It has been stated in several cases that amendments will be allowed, even though the effect be to *change* entirely the cause of action or defence. But there is no case in which it has been decided that an amendment may be made by *adding* a distinct and independent cause of action, inconsistent in all its material bearings with that already stated in the complaint. (*Id.*)
11. An order of the court allowing the amendment of a complaint of an additional, independent and inconsistent cause of action, is reviewable on appeal, on the grounds of want of jurisdiction to make it, and as involving a substantial right. (*Id.*)
12. In actions brought by the plaintiff in a representative capacity, an averment in the body of the complaint of such representative capacity: Also that the action is brought by him in such capacity, is sufficient to sustain a recovery in that capacity. Thus, in an action by "F. H. & J., commissioners of highways," the complaint commenced, "The plaintiffs, commissioners of highways complain," &c., *held*, that a cause of action in the plaintiffs, as commissioners, could be proven. (*Fowler agt. Westervelt, 17 Abb. 59.*)
13. A complaint which alleges an agreement between the defendant and A, and an assignment of it by A to the plaintiff, the plaintiff cannot recover by proving such an agreement between himself and the defendant. (*Curtis agt. Marshall, 8 Bosw. 22.*)
14. A motion to dismiss the complaint at the trial should be denied where the plaintiff, by distinctly proving the contract and breach, has shown a right to recover, at least, nominal damages. (*Weber agt. Kingsland, 8 Bosw. 416.*)
15. In an action in the superior court of the city of New York, against a for-

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- sign corporation, where the complaint states a cause of action of which the court has jurisdiction, it is unnecessary to aver that the plaintiff resides within the city of New York. Where the complaint against the indorser of a promissory note, which is payable in the city of New York, alleges due demand, non-payment and protest, and that the defendant had due notice of such non-payment and protest, it is sufficient, without averring notice of the demand also. (*Spencer agt. Rogers' Locomotive Works*, 8 Bosw. 612.)
16. In an action which was formerly an action at law, the plaintiff is not required to anticipate and avoid matters of defense, and is at liberty to disprove or impeach them, although he has put in no reply. (*Van Nest agt. Talmage*, 17 Abb. 99.)
17. A new substantive cause of action cannot be set up by supplemental complaint. The matter of a supplemental complaint must be consistent with and in aid of the case made by the original complaint. In an action upon notes, after answer that the notes had been paid by the acceptance of defendant's bonds in satisfaction, *held*, that it was improper to allow a supplemental complaint, setting forth such bonds, and claiming a recovery upon them. A plaintiff cannot be permitted to recover judgment upon a cause of action not in existence at the commencement of this action. (*Watson agt. Thibou*, 17 Abb. 184.)
18. The rule is to allow great latitude in setting out in the complaint the particular acts from which the conspiracy is to be inferred, in an action for a conspiracy, even so far as to allow the individual acts of the conspirators to be averred. So far as the allegations of such acts are scandalous, they should be stricken out, unless they appear to relate to the foundation of the plaintiff's action. (*Mussina agt. Clark*, 17 Abb. 188.)
19. A complaint by the assignee of a fire policy averred an insurance of the assignor on his building; that the policy was duly assigned, with the consent of the insurers: that the plaintiff, at the time of the loss, was the lawful owner of the policy, and of the claim against the insurers by reason of the policy and loss, and he made a demand of payment, accompanied with the written assent of the person to whom the original assured had, after the loss, assigned all his property. (*Fowler agt. N. Y. Indemnity Insurance Co.*, 36 N. Y. E. 422.)
20. *Held* bad, on general demurrer, as not showing any interest in the subject insured of the plaintiff or his assignor. (*Id.*)
21. A complaint which gives the names of the plaintiffs in the title of the cause, with the description of them as "commissioners of highways," and in the body of the complaint it is averred that "the plaintiffs, commissioners of highways, complain," this sufficiently indicates the character in which they complain, and shows that the claim is made by them as officers, and not as individuals. (*Fowler agt. Westervelt*, 40 Barb. 374.)
22. In an action to recover back money paid on compulsion, or by duress of goods, the complaint should state the facts, and not a mere conclusion of law. The court must be able to see, from the facts stated, that the payment was in fact compulsory, and compelled by duress of the party's goods. It is not sufficient simply to allege, in a general way, that the payment was compulsory, and not voluntary. (*Commercial Bank of Rochester agt. City of Rochester*, 41 Barb. 341.)
23. It need not be stated, in a complaint, that the plaintiff has legal capacity to sue. The want of such an allegation affords no ground of demurrer. A corporation suing as such, need not allege in the complaint that it is a corporation duly incorporated and has legal capacity to sue. (*Phoenix Bank of New York agt. Donnell*, 41 Barb. 571.)
24. Where a plaintiff sues by an appropriate corporate name, it is not necessary to expressly aver in the complaint that the plaintiff is a corporation; there being in such a case an implied averment in the complaint that the plaintiff is a corporation: *Aliter* in a suit by a corporation incorporated by the name of an individual. (*Id.*)
- See LANDLORD AND TENANT, 4, 5, 6, 7.
- See PARTIES, 8, 9.
- See INJUNCTION, 1, 2, 3, 4, 5, 6, 7.
- See IRRELEVANT AND REDUNDANT MATTER, 1.
- See MARRIED WOMEN, 13.

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CONSTITUTIONAL LAW.

1. *Interesting to bondholders.*—An act of the legislature of New Jersey, "to relieve the creditors and stockholders of the Somerville Water Power Company, and of the Hudson Manufacturing Company," and also a supplementary act, by which certain persons therein named were authorized to sell the whole of the mortgaged property at public sale to the highest bidder, free from all incumbrances, and after paying expenses and certain costs, to distribute the proceeds among the creditors according to the priorities of their several liens, held to be unconstitutional and void, as "impairing the obligation of contract," in reference to a sale made under the act, of the property and effects of the first-named company, where there were original outstanding bonds of that company secured by mortgage on its property, due and unpaid to the mortgagees, prior to the passage of the act. (*Martin agt. Somerville Water Power, Co., ante 161.*)
2. For the reasons, that any legislation which defeats the estate of the mortgagee without payment or tender of the whole debt due on the bonds; which gives a preference to posterior liens, and which deprives the mortgagee of his remedy given by the covenants of his contract, as also that given by the law of the land, impairs the obligation of contract, and is contrary to the letter and spirit of the constitution. (*Id.*)
3. The act may be remedial as to the owners of the equity of redemption and those having liens against it, but the mortgagees have a right to say: we have never agreed to have our estate defeated, to suit the convenience of others. (*Id.*)
4. The fifth section of the laws of 1859, ch. 489, allowing the comptroller of the city of New York to take measures, in the name of the city, to reverse or modify judgments against the latter, on the ground of collusion or fraud, is not unconstitutional. No court has a right to declare a legislative act unconstitutional unless it is glaringly so; and this rule applies with peculiar force to the action of a single judge on a collateral motion. (*Macomber agt. Mayor, &c. of New York, 17 Abb. 35.*)
5. The federal constitution does not invest congress with the power to exempt from state taxation securities of the federal government issued upon loans effected before the enactment exempting moneys thus invested from taxation. (*Upon writ of error from the supreme court of the United States, this judgment was reversed.*) (*People agt. Commissioners of Taxes, 26 N. Y. R. 163.*)
6. In respect to loans already effected, the exemption operating simply for the benefit of the original vendor or his assigns, cannot aid the federal government in borrowing money, and cannot be upheld as auxiliary to any power granted by the constitution. (*Id.*)
7. The legislative power, in this state, is absolute and unlimited, except by the restrictions of the constitution. (*Bank of Chenango agt. Brown, 26 N. Y. R. 487.*)
8. The provisions in the constitution of 1846 (art. 8, §§ 1, 9), that corporations may be formed under general laws, and that the legislature shall provide for the organization of cities and incorporated villages, are merely directions for the exercise of an authority which had been restricted by former constitutions, and not grants of power. (*Id.*)
9. The act (ch. 426 of 1847, § 92) authorizing the electors of an incorporated village to determine what sections of the general act for the incorporation of villages shall apply to their village, is valid and constitutional. It is not the delegation of legislative power, but a tender to these municipalities of such specified amendments to their respective charters as they may elect to accept. (*Id.*)
10. It seems that the duty of issuing warrants for the collection of taxes under this statute is imposed upon the trustees as a body, and the power may be exercised by the vote of a quorum at any regular meeting duly convened. It is not the act of the individual officers; and the warrant is valid without the signature of all. (*Id.*)
11. The renewal of a warrant being authorized as a part of the general act which had been adopted by a village, such a renewal is not invalid because the warrant professes on its face to be in pursuance of a special act of the legislature for that purpose which may be unconstitutional. (*Id.*)
12. The act of the legislature to amend an act entitled "An act to revise, amend and consolidate the several acts

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relating to the village of Whitesborough," (*Laws of 1859, ch. 10.*) so far as it provides for the election of a police justice by the electors of the village of Whitesborough, and clothes him with the same jurisdiction as a justice of the peace of the town of Whitestown, is unconstitutional. The case of *Brandon* agt. *Avery* (22 N. Y. R. 469,) commented on, and distinguished from this case. (*Waters* agt. *Langdon*, 40 Barb. 408.)

See RIOR ACT, 1, 2, 3, 4, 5, 6, 7.

CONTEMPTS.

1. The 12th section of the Revised Statutes (2 R. S. 278), provides that "contempts committed in the immediate view and presence of the court may be punished summarily; in other cases the party charged shall be notified of the accusation, and have a reasonable time to make his defence." (*People ex rel. Greeley* agt. *Court of Oyer and Terminer*, ante 14.)
2. In case of contempt arising under the last clause of this section, the jurisdiction of the court to make the order to show cause, does not depend upon the presentation of *affidavits or other evidence to substantiate* the charge. The court may act upon its own motion, and make the accusation, causing the party accused to be notified, and giving him a reasonable time to make his defence. The order contains the charge. And, it seems, that the party charged may appear by his counsel and make his defence. (*Id.*)
3. The writ of prohibition issues out of this court to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction. Where a court of oyer and terminer has jurisdiction touching contempts, this court has no right to interfere touching the practice of that court, by writ of prohibition or otherwise. (*Id.*)

CONTINUANCE.

1. The court has no power, on motion, to allow a continuance of the action by or against the representatives of a party to the action, on the expiration of one year from the death of such party. The supplemental complaint, contemplated by § 121 of the Code, as a substitute for a bill of revivor, is served as a matter of right; and upon such complaint, and the pleading of the adverse party, the pro-

priety of allowing a continuance of the original action is the only question in controversy, and is to be tried like any other issue. (*Matter of Borsdorf*, 17 Abb. 168.)

2. Before the Code, there were known in the equity practice two modes of proceeding to revive a suit; one under the Revised Statutes, in the cases provided for by it, by summary application founded on petition or affidavit; and one by filing a bill of revivor. (*Matter of Borsdorf* agt. *Lord*, 41 Barb. 211.)
3. The revivor, on motion, under section 121 of the Code, although it has a wider range as to the cases in which it is applicable and necessary, and has a more limited period within which the motion can be made, still, in effect, stands in the place of the summary application, and the supplemental complaint stands in the place of a bill of revivor. (*Id.*)
4. As under the former practice, it was not necessary to obtain from the court leave to file a bill of revivor, so it is now unnecessary to apply to the court, by motion, for leave to continue the action against the executor of a deceased defendant, by filing a supplemental complaint; although more than a year has elapsed since the death of the party. (*Id.*)

CONTRACT.

1. A claim for damages for the breach of a *parol contract*—to sell *standing trees*, cannot be sustained. The contract not being in writing is void. (*Lawrence* agt. *Smith*, ante 327.)
2. Where such contracts are enforced specifically in equity, it is in part owing to the circumstance that no recovery in damages for the breach of them can be had. Courts of equity do not remunerate parties by damages arising out of the breach of agreements which are void under the statute of frauds. (*Id.*)
3. Therefore, the promise of the plaintiff who is alleged to have violated such a contract, to pay a certain sum as damages for such alleged violation, is without consideration, and cannot be enforced by the defendants as a recoupment; although the action is brought upon the defendant's promissory note, given for part of the purchase price of the property sold under the contract. (*Id.*)

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4. The unqualified refusal of a contractor for a part of the work on a building in progress of erection, to perform what he has undertaken, is in itself a breach of the contract. The employer is not bound to delay the completion of the building during the period which was allowed to the contractor for performance. If after such refusal, the contractor can reinstate himself, he must, at least, show a subsequent offer and readiness to perform in time. (*Thompson agt. Laing*, 8 Bos. 482.)
5. Where a contract has been made for the construction of a vessel or a building, at a fixed price, the contractor cannot recover additional compensation, as for extra work, merely upon proof that such work was done at the defendant's request, and that he accepted the work when completed. The defendant's request, in the absence of other evidence, is deemed merely a notice of his claim that the contract calls for such work. (*Collins agt. Collins*, 17 Abb. 467.)
6. A judgment in favor of the owner of a vessel against the builder, for damages for a failure to complete the vessel according to contract, is a bar to an action by the builder for extra work performed during the building of the vessel. (*Id.*)
7. Though the meaning of terms used in a contract may be determined by usage, it is not competent for a witness familiar with the usage to testify as to what construction the contract bears. (*Id.*)
8. A building contract made an architect's certificate of fulfillment a condition precedent to payment. *Held*, that when the architect unreasonably and in bad faith refused the certificate, the builder might recover upon giving other proof of performance, as well, it seems, where the action is upon the contract as where it is upon a quantum meruit. (*Thomas agt. Fleury*, 26 N. Y. R. 26.)
9. Where there is an express contract about demurrage, the parties are held strictly to its terms, and, in general, no excuse is available for delay, though without the fault of the party, which is not stipulated in the contract. (*Cross agt. Beard*, 26 N. Y. R. 85.)
10. In the absence, however, of express agreement, a contract is implied that the owner and consignee of goods will provide for discharging them in a reasonable time, to be ascertained by the jury from a consideration of all the circumstances. (*Id.*)
11. *Held*, accordingly, that the consignee of goods, to be discharged at his own wharf on Lake Ontario, was entitled to explain his delay in giving a berth to the ship, by proof that a break on the Erie canal, and a storm on the lake, had caused an unusual number of vessels to be collected at his wharf just before the arrival of his goods. (*Id.*)
12. The owner of land may, by parol contract with the purchasers of successive parcels in respect to the manner of its improvement and occupation, affect the remaining parcels with an equity requiring them also to be occupied in conformity to the general plan, which is binding upon a subsequent purchaser with notice of the fact, though his legal title be absolute and unrestricted. (*Tallmadge agt. East River Bank*, 26 N. Y. R. 105.)
13. The owner of lots on both sides of a city street made a plan exhibiting the street as widened eight feet on each side, and represented to several vendees of different lots that all the buildings to be erected on the lots he had sold and should sell, should stand back eight feet from the line of the street. The vendees erected buildings in conformity with this plan; none of them being restricted by their conveyances or bound by any covenant in respect to the extent or their mode of occupation:
14. *Held*, that a subsequent purchaser of one of the lots, with constructive notice of the facts, was not at liberty to build upon the eight feet adjoining the street. (*Id.*)
15. The doctrine of dedication is, it seems, inapplicable to the case; the strip in front of each lot not being reserved to the grantor nor appropriated to public use. (*Id.*)
16. It seems that the uniformity of the position of the houses was sufficient alone to put the purchaser upon inquiry and charge him with notice: *Per SUTHERLAND, J.* (*Id.*)
17. It seems, also, that the equity existing between the grantor and his grantees is mutual as between his grantees, without regard to priority

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of conveyance: *Per SUTHERLAND, J. (Id.)*

18. The compensation of an agent or servant, employed under a special contract, the complete performance of which is prevented by his sickness and death, is not confined to a *quantum meruit*, but is to be measured by the contract. (*Clark agt. Gilbert, 26 N. Y. R., 279.*)

19. Whether the compensation is to be reduced by an allowance in the nature of damages for a loss of profits which, but for the agent's death, would have accrued to the principal as a result of his further services, *quære. (Id.)*

20. A contract for the sale of goods for the price of fifty dollars or more, is not taken out of the statute of frauds by the payment of a part of the purchase money, by the buyer, unless the payment is made at the time of making the contract. A payment afterwards will not avoid the statute. *Johnson, J., dissented. (Bissel agt. Balcom, 40 Barb. 98.)*

21. Where, in an action to recover money due for work done upon a building contract, the defence is that the building was to be completed by a specified time, and that it was not completed within the time, if it appears that the defendant had the building erected for his own use and that he was kept out of its use by the plaintiff's failure to perform on his part, the law will presume that he was damaged, and will give him, by way of compensation, what such use was worth for the time he was deprived of it. So if he shows that he was deprived of the privilege of renting the building by the plaintiff's default. (*Wagner agt. Corkhill, 40 Barb. 175.*)

22. But if it be proved that the defendant did not contemplate using the building himself, or in his own business, but that he caused it to be built for the purpose of renting it to others; and that he did not in fact lose any opportunity of renting it by reason of the plaintiff's delay, he cannot recoup against the plaintiff's claim, the rents and profits of the building, from the time when it should have been, to the time when it was completed. (*Id.*)

23. The vendor of lands may bring a suit in equity to obtain a specific performance of the contract of purchase, although he has an adequate remedy by suit, at common law, to recover the

contract price, in damages. (*Schroepel agt. Hopper, 40 Barb. 425.*)

24. A court of equity can give effect to parol contracts; and a release not under seal, is equivalent to a parol agreement for a release of the premises described in it. (*Headley agt. Goudry, 41 Barb. 279.*)

25. Relief is given in such cases, and imperfect contracts made effectual where the party seeking such relief is clearly entitled to the intervention of the court; upon the principle that what is agreed to be done is considered in equity as done when it ought to be done. (*Id.*)

26. Where the contract of sale, in express terms, makes the payment of the purchase money a condition precedent to the right of the purchaser to a conveyance, and in addition to this the purchaser gives his note for one of the payments, and procures other persons to sign it jointly with him, this puts the intention to make the note in the nature of an independent promise, or a condition precedent beyond all doubt. (*Id.*)

27. Before a purchaser can set up, as a defence to an action on a note given as collateral security for an installment of the purchase money, the inability of the vendor to give a good title to a portion of the premises, he must surrender the possession of the premises. (*Levis agt. McMillan, 41 Barb. 420.*)

See ASSIGNEE, 3, 4, 5.

See BREACH OF CONTRACT.

See PRINCIPAL and AGENT, 9.

See POSSESSION OF PERSONAL PROPERTY, 12.

CORPORATIONS.

1. A stockholder of a corporation holding a claim against it for which the stockholders are individually liable, cannot recover upon it in an action against one of the stockholders individually. He can only set up the claim in a proper action against the stockholders generally for a contribution. (*Beers agt. Waterbury, 8 Bos. 396.*)

2. A member of a corporation, whose charter the legislature has reserved the power to repeal or modify, holds his stock subject to such liability as may attach to him in consequence of an ex-

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- tension or renewal of the charter, without his application or consent. (*Bailey* agt. *Hollister*, 26 N. Y. R. 112.)
8. *Held*, accordingly, that the estate of an intestate succeeded to the individual liability imposed on him as a stockholder in a corporation whose charter would have expired, but was extended after his death, by such act of extension, and his administrator is liable for debts of the corporation contracted after the death of the intestate. (*Id.*)
 4. The stockholder or his personal representative can, it seems, relieve himself only by selling the stock. (*Id.*)
 5. Whether, when the charter has actually expired, the original stockholder may, without his assent, be continued as a corporator, *quere*. (*Id.*)
 6. Genesee College could lawfully stipulate, in consideration of a subscription to its endowment, to give one free scholarship forever to the subscriber his heirs or assigns, in another incorporated seminary of learning. (*Genesee College* agt. *Dodge*, 26 N. Y. R. 213.)
 7. The admission of one of the defendants is inadmissible to charge others with whom he is sued, to enforce their personal liability as stockholders of an insolvent corporation. Their liability is several, and not joint: *Per* ROSEKRANS and SELDEN, JJ. (*Simmons* agt. *Sisson*, 26 N. Y. R. 264.)
 8. Whether one stockholder of a plank-road corporation can maintain an action against one or more other stockholders, less than the whole, to recover a debt due him from the corporation, *quere*. It seems that he must bring his action against all the stockholders liable for contribution: *Per* ROSEKRANS, J. (*Id.*)
 9. A plaintiff who has commenced and prosecuted with reasonable diligence his action for the wrongful conversion of shares of corporate stock, is entitled to recover the highest price it has reached between the time of conversion and the end of the trial. (*Romaine* agt. *Van Allen*, 26 N. Y. R. 309.)
 10. So held in a case where the trial was protracted, and the price of the stock rose during its continuance from \$5,962 to \$8,175. (*Id.*)
 11. Whether a transfer of the assets of a moneyed corporation, exceeding \$1,000 in value, without the previous action of the directors, is not illegal and void, so that the maker of the note might set it up as well as the corporation, its stockholders or creditors, *quere*: *Per* SELDEN, J. (*Nelson* agt. *Eaton*, 26 N. Y. R. 410.)
 12. Where any improper condition is imposed by one of the projectors of a company before its organization, in respect to a loan to be made by it, this will not invalidate the transaction consummated after the company is organized, unless the company has adopted and ratified the act of its agent. (*Central Park Fire Ins. Co.*, agt. *Callaghan*, 41 Barb. 448.)
 13. If a stockholder is living, and a resident of the county in which the notice to stockholders is published, at the time the publication commences, his death afterwards will not abate the proceedings or render the publication ineffectual. (*Diven* agt. *Duncan*, 41 Barb. 520.)
 14. *Held*, that general reputation that the plaintiffs were conducting business as a corporation, coupled with the fact that the note sued on was payable to them, was sufficient evidence of the existence of the corporation to prevent a dismissal of the complaint, for want of proof of publication of the articles under the statutes of another state (*Holmes* agt. *Gilliland*, 41 Barb. 568.)
 15. If the power of making and indorsing promissory notes for and in the name of a corporation is not expressly conferred upon its agent and attorney, by the instrument by which he is appointed, general words, at the conclusion thereof, authorising him "to do all other acts and things for and in behalf of the said company that he may deem proper to further and protect its interests," cannot have that effect. (*Lawrence* agt. *Gebhard*, 41 Barb. 575.)
 16. Proof that the agent of a corporation is in the habit of giving notes for the company is inadmissible unless accompanied by proof that the company has some knowledge that the agent was in the practice of giving notes in its name. The fact that such agent is a director gives him no authority, except when acting as a member of the board, unless there is some by-law conferring power upon him. (*Id.*)

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See MUNICIPAL CORPORATIONS.

See COMMISSIONERS OF HIGHWAYS, 5.

See TRUSTEES, 2, 3, 4, 5, 6.

See CONSTITUTIONAL LAW, 7, 8, 9, 10, 11.

See BOARD OF EDUCATION, 4.

See BILLS OF EXCHANGE and PROMISSORY NOTES, 12, 13.

COSTS.

1. No costs will be taxed for the attendance and travel fees of *foreign witnesses* at previous circuits, where they have all disappeared when the cause was tried. (*Mead* agt. *Mallory*, ante 32.)
2. And in allowing the fees of home witnesses who attend at the trial, and who reside but a short distance from the court-house in the same county, any *travel fees* for such witnesses charged as having been subpoenaed and travelled from a far distant county, will be stricken out. If they were temporarily called away from home on business, they should have been subpoenaed in due time. (*Id.*)
3. The costs to the appellant, under § 371 of the Code (as amended in 1862), does not depend upon the sole fact that he has recovered a more favorable judgment, but whether his notice of appeal was sufficient. (*Forsyth* agt. *Ferguson*, ante 67.)
4. In an action for the recovery of possession of personal property, where the plaintiff recovers judgment for the value of the property amounting to \$43.70, together with 6 cents damages for the unlawful taking, he is entitled to recover the same amount as costs, although no proceedings were taken by the plaintiff for the claim and delivery of the property under § 206 et seq. of the Code. (*Corbin* agt. *Milton*, ante 76.)
5. In proceedings upon a common law certiorari, to review proceedings of commissioners of highways, the prevailing party is entitled to costs. (This agrees with *Haviland* agt. *White*, 7 How. P. R. 154; *People* agt. *Flake*, 14 id. 527; and *People* agt. *Robinson*, a third district general term decision, 1859, not reported; and is adverse to *People* agt. *Heath*,

20 How. P. R. 304.) (*People* agt. *Commissioners of Highways of Scho-dack*, ante 158.)

6. The provisions of the Revised Statutes, directing that costs shall not be awarded in actions brought against executors or administrators in their representative capacity, except for unreasonable resistance, neglect or refusal to refer the claim, do not affect actions brought against the deceased in his life time, and revived by his executors or administrators. (*Mitchell* agt. *Mount*, 17 Abb. 213.)

See REFEREES and REPORTS, 17.

See TRIAL, 2.

See WITNESSES, 4, 5, 6, 7, 8.

See PAYMENT, 1, 2.

See ATTORNEYS, 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12.

See SUREGATE, 5.

See COURT OF APPEALS, 1, 3.

See JUDGMENT, 7.

See EXECUTION, 1.

COUNTER-CLAIM.

1. In an action for a limited divorce on the ground of cruelty, the defendant cannot set up as a defence or counter-claim the adultery of the plaintiff. (*Henry* agt. *Henry*, ante 5.)
2. A demand against the plaintiff for a wrongful conversion in removing from the demised premises fixtures placed there by the tenant, one of the defendants, but of which the lease did not contemplate the erection nor provide for the privilege of removal, is not available as a counter-claim in an action on a bond to recover the rent due upon the lease. (*Mayor, &c.*, agt. *Parker Vein Steamship Co.* 8 Bos. 300.)
3. A demand not set up as a counter-claim in the answer, cannot be recovered as such. (*Beers* agt. *Waterbury*, 8 Bos. 396.)
4. In an action for the foreclosure of a mortgage, the defendants not personally liable to pay the amount secured, cannot interpose a counter-claim arising out of transactions unconnected with the subject of action. The right of the plaintiff to claim, and the right of defendant to counter-claim, upon any given or supposed facts in contro-

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versy, must be reciprocal. (*Agate* agt. *King*, 17 *Abb.* 159.)

5. A plaintiff who has set up his cause of action as a counter-claim against the same parties in a previous action should be put to his election between the two modes of relief, but is not otherwise barred by the pendency of the former action. In an action where the defendant may set up his counter-claim or set-off in answer to the plaintiff's demand, he has his election to do so or to bring a cross action. (*Coll-yer* agt. *Collins*, 17 *Abb.* 467.)

6. The defence of usury is not a counter-claim, within the meaning of the Code. Matter which shows that the plaintiff never had any cause of action against the defendant which the law would aid him in enforcing, is no counter-claim. (*Prouly* agt. *Eaton*, 41 *Barb.* 409.)

See LANDLORD and TENANT, 2, 3.

See CONTRACT, 1, 2, 3.

See MORTGAGE OF CHATELS, 6.

See APPEAL, 26, 27.

See BANKS, 3, 4.

See DIVORCE, 11.

See MARRIED WOMEN, 7.

COUNTY COURTS.

1. By the amendment to the Code in 1862, county courts are authorised to try certain actions by a jury that are brought into these courts by appeal from justices' courts, to wit: When the amount of the claim or claims of either party litigated in the court below shall exceed \$50; or when in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered shall exceed \$50, exclusive of costs. And 1. When the judgment was rendered upon an issue of law joined between the parties. 2. When it was rendered upon an issue of fact joined between the parties whether the defendant was present at the trial or not. (*Monroe* agt. *Monroe*, ante 208.)
2. The county court (by the judiciary act of 1847) has the same power as the late court of common pleas had to incorporate a bill of exceptions or a case and exceptions into a judgment roll, in an action brought into that court by appeal from a justice's court. And the supreme court, on appeal

from such judgment of the county court, can review any errors brought up by the record, including those, of course, which are contained in the case or exceptions. (*Id.*)

3. Where an action is brought in a justice's court, to recover damages, as claimed in the complaint at \$100, and on the trial a verdict is rendered for the plaintiff for \$30—no evidence being given which laid the damages beyond \$50: On appeal to the county court, the cause is properly triable there before a jury; as it is the amount of the claim in the pleadings, and not the amount of recovery in the court below, which confers jurisdiction on the county court under § 352 of the Code. (*Ovenshire* agt. *Ades*, ante 368.)

4. By the Code (§ 352) which gives a new trial in the county court, upon an appeal from a justice's court, when the amount litigated exceeds \$50, the new trial in the county court is a matter of right, not to be withheld for any want of particularity in the statement of the grounds of the appeal. Where the statement in the notice of appeal, that the judgment appealed from was against law and evidence, held, sufficient to sustain the appeal. (*Fowler* agt. *Westervelt*, 17 *Abb.* 59.)

5. Under § 352 of the Code, an objection to the form of the complaint, not taken before the justice, cannot be raised before the county court on the new trial. (*Id.*)

6. An appeal to the supreme court, from a judgment of the county court, does not authorize the supreme court to reverse the judgment and grant a new trial upon exceptions taken upon the trial in the county court. (*Carter* agt. *Werner*, ante 385.)

7. A new trial must be moved for in the county court, before an appeal can be taken on a case or bill of exceptions in that court to the supreme court. (*This seems to be adverse to Monroe* agt. *Monroe*, ante p. 208.) (*Id.*)

8. A non-suit will not be granted in a county court, on appeal from a justice's court, on the grounds that the plaintiffs have sued as individuals and not as commissioners of highways; and that the complaint does not aver that they are commissioners. The objection should be made in the justice's court. (*Fowler* agt. *Westervelt*, 40 *Barb.* 374.)

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9. County courts have jurisdiction of actions for the specific performance of contracts. (*Williston* agt. *Williston*, 41 Barb. 635.)

See NEW TRIAL, 5.

See JUSTICE'S COURT, 6, 7, 8, 13.

COURT OF APPEALS.

1. There is no limit to the number of term fees, taxable for terms, in which a cause has been necessarily on the calendar of the court of appeals. (*Glentworth* agt. *Mount*, 17 Abb. 15; *Shaw* agt. *Dwight*, *id.* 18.)
2. When a remittitur from the court of appeals is filed in the court below, the latter court has no power to render any other judgment than one simply adopting that of the court of appeals. (*Macgregor* agt. *Buell*, 17 Abb. 81.)
3. On an appeal from the decision of a surrogate, where the decision is affirmed by the supreme court, and on appeal to the court of appeals both decisions are reversed, without costs, the appellant is not entitled to costs in either court. (*Id.*)

CRIMINAL LAW.

1. To constitute the crime of murder, the malice or the design need not be proved. When the act is committed, the law imputes the design. It proceeds from the rule that a man is presumed to intend to do what he really does. (*Kenney* agt. *The People*, ante 202.)
2. Therefore, if a man strikes a blow with a deadly weapon, which necessarily or reasonably results in death, the law will impute to him the design to destroy life; and this, too, whether he be drunk or sober. (*Id.*)
3. Neither can the crime of murder be reduced to manslaughter by showing that the perpetrator was drunk, when the same offence if committed by a sober man would be murder. (*Id.*)
4. A certiorari issued under 2 R. S. 736, § 27, which requires the district attorney to sue out the writ when judgment shall have been stayed upon any indictment, brings up the indictment as well as the exceptions. (*People* agt. *Monnais*, 17 Abb. 345.)
5. Evidence of acts and declarations by an accomplice, in the absence of the principal, is properly received, if fol-

lowed by evidence of complicity sufficient to be submitted to the jury. This rule applied on the trial of a prisoner for a rape, for which he had been indicted jointly with the accomplices. (*Id.*)

6. A court of oyer and terminer gave judgment for the prisoner on demurrers to special pleas establishing a good defence. The plea of not guilty remained on the record undetermined. The supreme court reversed the judgment on the demurrers, and ordered a new trial. *Held*:
7. 1. That the judgment of the oyer and terminer was final, and appealable to the supreme court. (*Hartung* agt. *People*, 26 N. Y. R. 154.)
8. 2. That the judgment of the supreme court, though directing a new trial, was final so far as that court is concerned, and therefore appealable to this court. (*Id.*)
9. The record having been remitted to the court of oyer and terminer, this court has power to reach it for the purpose of reviewing the judgment of the supreme court; but whether the writ of error should be addressed to the inferior court, the supreme court, or both, *quære*. (*Id.*)
10. On the trial of an indictment for keeping a bawdy house, evidence is admissible of repeated arrests of girls at the prisoner's house upon the charge that they were prostitutes; that the prisoner procured bail for them; that such arrests were made at late hours in the night; and that women before convicted as prostitutes were frequently found at his house. (*Harwood* agt. *People*, 26 N. Y. R. 190.)
11. To convict one charged with uttering a counterfeit bank check set out in the indictment and purporting to have been certified by some person purporting to be connected with the bank on which the check was drawn, it is sufficient to prove that the words of certification were false, and that no person of the name signed to the certificate was connected with the bank, without showing that the signature of the drawer was a forgery. (*People* agt. *Clements*, 26 N. Y. R. 193.)
12. A certified check on a bank is an instrument which, as an entirety, comes within the statute of forgery; and where evidence, received without objection, shows that any material part

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- of it was forged, *e. g.*, the certificate, it is immaterial that the indictment does not specify that the forgery was of the certification, and not of the check itself. (*Id.*)
13. The indictment need not aver that the paper is, in the words of the statute, "an order for the payment of money, or any instrument by which a pecuniary demand is created." (*Id.*)
14. *Re* agt. *Howell*, (8 *Carr. & Pa.* 148,) distinguished, on the diversity between our statute and the British. (*Id.*)
15. Since the Revised Statutes, it is unnecessary, in an indictment for burglary in breaking, &c., with intent to commit a crime, to specify what kind of felony was intended. (*Mason* agt. *People*, 26 *N. Y. R.* 200.)
16. In a tenement house, severed by lease into distinct habitations, each room or suite of rooms occupied by a tenant in his dwelling house, and a door of such room is an outer door so that a breach of it in the daytime is burglary, though the common door, for passage into the street, be open. (*Id.*)
17. Under the act to punish seduction as a crime (*ch.* 111 of 1848), it is sufficient that the defendant effected his object by a conditional promise that, if the girl would permit his illicit connection, he would marry her. (*Kenny* agt. *People*, 26 *N. Y. R.* 203.)
18. The submitting to his embraces upon this proposition is, it seems, a promise to marry on her part. (*Id.*)
19. Evidence of general reputation of the girl's want of chastity is inadmissible. Previous chaste character, in this statute, means actual personal virtue—not reputation; and can be impeached only by specific proof of lewdness. (*Id.*)
20. The corroboration of the seduced female, required by the statute, relates to the promise and the intercourse; it is not necessary in respect to her chastity or to her being unmarried. (*Id.*)
21. The evidence of the seduced female is admissible that the promise of marriage was the inducement to the illicit intercourse. (*Id.*)
22. It is unnecessary that the promise should be a valid one, or that the defendant be of full age. It is sufficient that he has arrived at the age of puberty. (*Id.*)
23. Where a prisoner has made confessions under the influence of threats or promises, evidence may be received of facts having been ascertained in consequence of such confessions without proof of his statement as to the facts discovered, unless he require proof of so much of his confessions as related to those facts. (*Duffy* agt. *People*, 26 *N. Y. R.* 588.)
24. The jury in criminal cases are bound by the instructions of the court as to the law, to the same extent as in civil cases. (*Id.*)

DAMAGES.

1. It is error to estimate damages between the value of the lease before and after the injury, in an action by the owner of leasehold premises, for damages for an injury thereto, without malice, and from a cause which could be ascertained and its continuance prevented at a moderate expense. (*Terry* agt. *Mayor, &c. of New York*, 8 *Bos.* 504.)
2. One who suffers injury by water pipes upon premises adjoining his own, cannot recover damages therefor, without evidence of original defects in the pipes, or of want of care in discovering or repairing known defects. (*Id.*)
3. In an action for forcible and malicious injuries, the jury may give punitive damages. Where in an action for trespass, in wrongfully entering the plaintiff's office, and there making a disturbance and a violent assault upon the plaintiff's clerk, it appeared that the defendant went there for the purpose of demanding payment of a small debt, with the malicious intent of provoking a quarrel with the clerk in case he was not paid, and that he assaulted and wounded the clerk in pursuance of his intention, *Held*, that a verdict of \$400, was not excessive. (*Walker* agt. *Wilson*, 8 *Bos.* 586.)

See CONTRACT, 1, 2, 3, 18, 19.

See COUNTY COURTS, 3.

See APPEAL, 19.

See POSSESSION OF PERSONAL PROPERTY, 1, 2.

See LANDLORD AND TENANT, 2, 3.

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See WITNESSES, 14, 15, 16, 17, 18.

See RAIL ROADS, 3, 4, 5.

See AGREEMENT, 10.

DEED.

1. A deed delivered to the grantee is not held as an eschew; such delivery either takes effect as absolute, or it is void and works nothing. (*Braman agt. Bingham*, 26 N. Y. R. 483.)
2. Whether it makes any difference that the deed is handed to the grantee for the purpose of transmitting to a third person, to be held by him as an escrow, *quere*, *per* SELDEN, J., questioning as to this the case of *Gilbert agt. The North American Fire Insurance Company* (23 Wend. 43.) (*Id.*)
3. A deed delivered to the grantee to be deposited by him with a third person until the return of the grantor from a journey, and on that event to be redelivered to the grantor, is not an escrow because in no event to be delivered to the grantee. (*Id.*)
4. The owner of a tract of land lying in the city, caused the same to be plotted out and sub-divided into lots, and a map thereof to be made, and filed and recorded in the county clerk's office, on which was an open space, bounded on three sides by said lots, and on one side opening into a public street or highway, such open space being laid down and designated on said map as "park," and the owner subsequently sold and conveyed to different persons all the lots abutting on said open space, describing them by their numbers and by reference to said map:

Held, that the owner, when he laid out and plotted his tract of land, intended the open space to be a *park*, and not a mere *street* or *passageway* leading by and to the adjoining lots; and that the conveyances of those lots, executed by him, in which the lots were bounded on said "park," did not carry the grantees to the centre of the open space or park, but only to the exterior lines thereof. (*Perrin agt. N. Y. Central R. R. Co.*, 40 Barb. 65.)

5. C. and wife, on the 1st of April, 1853, executed a mortgage to the plaintiff, payable in three years, with interest. On the 21st of April, 1857, C. and wife conveyed the mortgaged premises to J. F., by a deed which was

never recorded. Subsequently L. and B. recovered judgments against J. F., which became liens on the premises. On the 30th of August, 1858, C. and W. F., with the intent of cheating and defrauding L. and B., made an arrangement, by which C. executed a deed of the same premises to W. F., which was at once recorded, and W. F. entered into possession. On the 21st of November, 1859, C. and W. F., for the purpose of deceiving and defrauding the plaintiff, represented to her that C. had conveyed the land to W. F. by deed, and that the latter had the full title thereto, free from all incumbrances except the plaintiff's mortgage, a prior mortgage to G., and two judgments in favor of C. and W. They finally induced her to take a deed of the land from W. F., and discharge her mortgage thereon, and to give a mortgage to C. for \$245.58, and her promissory notes to W. F. for \$154, the balance of the consideration, the plaintiff being ignorant of the deed to J. F., and relying upon the statements of C. and W. F. In February, 1860, the land was sold by the sheriff, upon an execution issued on the judgment in favor of B. B. became the purchaser, and a certificate of sale was delivered and recorded. In an action to have the mortgage discharge executed by the plaintiff declared null and void, and the bond and mortgage given to her by C. and wife reinstated, and the mortgage foreclosed; to have the deed from W. F. to the plaintiff, and the bond and mortgage from her to C. adjudged null and void, and for judgment against C. and W. F. for \$154 and interest:

Held, that the plaintiff having taken her deed from W. F. in good faith, and in ignorance of the prior unrecorded deed of C. and wife to J. F., she was protected against it by the recording acts; that the deed to J. F. was void, as to the plaintiff, and could not operate as even a color or shadow of title in any one, as against her; and that consequently the plaintiff had not been damaged, in any sense that a court of equity could recognize. (*Johnson agt. Crane*, 40 Barb. 78.)

6. That no prejudice could result to her by reason of the existence of the prior unrecorded deed, she having a clear record title under the same grantor, and being in possession of the premises. (*Id.*)

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7. A deed, expressing a money consideration, and acknowledging the payment thereof, is *prima facie* evidence that such was the true consideration, and that it has been paid. But a judgment creditor has a right to rebut this presumption, and to show that the sum specified in the deed was never paid by the grantee. (*Amsden* agt. *Manchester*, 40 Barb. 158.)

8. For this purpose it is proper to show that the grantee was a married woman, and had no separate property or estate before the execution of the deed; and that her husband was notoriously poor, and destitute of the means of paying the consideration specified in the conveyance. (*Id.*)

9. Those facts may be shown by the reputation of the parties, in respect to pecuniary means, in the town or neighborhood where they resided, on the question of the *bona fides* or *mala fides* of the transaction. (*Id.*)

See PARTITION, 4.

See ATTACHMENT, 1.

DEFENCE.

1. In an action for a *limited divorce* on the ground of *cruelty*, the defendant cannot set up as a defence or counterclaim the *adultery of the plaintiff*. (*Henry* agt. *Henry*, ante 5.)

2. Where a debtor gives a negotiable security for a demand, it does not preclude him from setting up a defence which was in existence when the security was given. This rule applied where the action was upon such subsequent security, and not upon the original demand. (*Hancock* agt. *Palmer*, 17 Abb. 335.)

3. A former judgment is a bar, not to all claims which might have been litigated therein, but only as to such matters as might have been litigated under the pleadings and issues as made. A purchaser of goods is not precluded from maintaining an action for a breach of warranty in regard to them, by the fact that he has suffered judgment by default in an action brought to recover the price. (*Barth* agt. *Burt*, 17 Abb. 349.)

4. A judgment of dismissal, on a trial in a former suit between the same parties, where the merits were inquired into, may be set up as a bar to a second action; especially if the action

be one that formerly would have been brought in a court of equity. (*Bostwick* agt. *Abbott*, 40 Barb. 331.)

5. Under the practice as sanctioned by the Code, the defendant in an action to recover the possession of lands may rely upon any equitable defence he may have. If he holds under an agreement to purchase, he may set up in his defence the same facts which, in a court of equity, would entitle him to a conveyance of the land. (*Trophagen* agt. *Trophagen*, 40 Barb. 537.)

6. A default for want of an answer will be set aside, on sufficient excuse being shown, and the defendant allowed to put in an answer, although the defence sought to be set up is that the note sued on was given for money won at play. (*Bank of Kinderhook* agt. *Gifford*, 40 Barb. 659.)

See COUNTER-CLAIM, 5.

See COMPLAINT, 1, 2, 3.

See JUDGMENT, 6.

See CONTRACT, 6, 21, 22.

See LANDLORD and TENANT, 2, 3.

See EXECUTION, 2, 3, 4, 5.

See BILLS OF EXCHANGE and PROMISSORY NOTES, 5, 6.

DEMURRER.

See PARTIES, 1, 2, 3.

DIVORCE.

1. In an action for a *limited divorce* on the ground of *cruelty*, the defendant cannot set up as a defence or counterclaim the *adultery of the plaintiff*. (*Henry* agt. *Henry*, ante 5.)

2. In actions for an *absolute divorce* for adultery, the complaint should allege that the discovery by the plaintiff of the defendant's criminality took place within a certain time before the commencement of the action, because, as it affects the propriety of decreeing a divorce, such time has been fixed by law, and the insertion of such allegation in the complaint is required by an absolute rule. (*Zorkowski* agt. *Zorkowski*, ante 37.)

3. The discovery of such criminality more than *five years* before bringing suit, is made by the Revised Statutes a defence to the action; but the 163 rule of the late court of chancery re-

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- quired most of the matter constituting a defence under such statutes to be negatived by the complainant in his or her bill of complaint, to enable the court, by the reference to a master, to take proof of all the material facts stated therein, and report the testimony taken thereon, to ascertain whether the facts required to be denied existed or not. The 86th general rule of the supreme court, providing merely for the substitution of an affidavit by the complainant for his or her verification of the complaint, was not intended to accomplish the same purpose as the former rule, and does not repeal it. (*Id.*)
4. The testimony in this case considered insufficient to establish the commission of adultery, and the case sent back to the referee to take further testimony. (*Id.*)
 5. Cruel and inhuman treatment, in order to justify a limited divorce, need not consist of injury to the person of the complainant. A husband who in presence of his wife, and in spite of her entreaties, unmercifully beats her child, inflicts an injury to her feelings, which is cruel and inhuman within the meaning of the statute. (*Bihin* agt. *Bihin*, 17 Abb. 19.)
 6. The defendant in an action for a limited divorce, who offers, in justification, to prove ill conduct of the plaintiff, will be restricted to proof of what preceded, or was contemporaneous with his own cruelty or misconduct. (*Id.*)
 7. The code, (§ 74.) which provides that the objection that an action was not commenced within the time limited can only be taken by answer, applies to actions for limited divorce. (*Id.*)
 8. A judgment of divorce may be vacated for irregularity, affecting the jurisdiction of the person, even after the prevailing party has married again; but this should be done with hesitation, and only after the gravest and most careful consideration. (*Wortman* agt. *Wortman*, 17 Abb. 66.)
 9. On appeal from a judgment granting a divorce and awarding alimony, the general term have power, upon reversing the judgment as to the alimony, and affirming it in other respects, to order a reference to ascertain what allowance and security therefor, are proper, and report the same with proofs. One-third of the husband's income cannot be deemed an extravagant proportion to award as alimony to the plaintiff. (*Forrest* agt. *Forrest*, 8 Bosw. 640.)
 10. A judgment of divorce will not be reversed on appeal, and a new trial ordered, merely because the record contains some technical exceptions which were well taken, if the court is satisfied upon the whole case that justice has been done. (*Id.*)
 11. Where a husband brings an action against his wife for a divorce, on the ground of adultery, the defendant cannot set up, by way of counterclaim, the adultery of the plaintiff, so as to entitle her to a judgment of divorce against him if the charge is proved. (*R. F. H.* agt. *S. H.*, 48 Barb. 9.)
 12. Proof of adultery, alone, is not sufficient to authorize a judgment of divorce. It must be averred in the complaint that the adultery was committed without the consent, connivance, privity, or procurement of the plaintiff; and the complaint must be verified by the oath of the plaintiff. (*Myers* agt. *Myers*, 41 Barb. 114.)
 13. Where a plaintiff, in his complaint, alleged that five years had not elapsed "since he discovered the fact that such adultery had been committed by the defendant without his consent, connivance or procurement;" held that this averment was not a compliance with the above rule. (*Id.*)
 14. Upon a reference in an action for a divorce, it is the duty of the referee to find not only as to the act of adultery, but also as to all other material facts, such as connivance of the plaintiff, &c. (*Id.*)
 15. The court will order any judgment for divorce, obtained by collusion or fraud, to be set aside, not from any regard to the parties concerned, but from motives of public policy. (*Singer* agt. *Singer*, 41 Barb. 139.)
 16. In such a case, it should be made apparent that the party moving is acting from good motives, and not from any expected personal advantages. (*Id.*)
 17. Where the judgment for divorce has been acquiesced in for the period of several years, and the plaintiff has again been married, some better reason than the mere gratification of personal feeling on the part of the defendant, or the desire to obtain a further

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sum of money from the plaintiff, should be made clearly to appear, before the court would be warranted in granting such an application. (*Id.*)

DOWER.

1. The surplus moneys arising on a sale of land under mortgage foreclosure, stands in the place of the land in respect to those having liens or vested rights therein. Consequently the widow of the owner of the equity of redemption is entitled to dower in the surplus, as she was in the land before the sale. (*Mathews* agt. *Duryea*, 17 *Abb.* 256.)

ESTOPPEL.

1. The recovery of judgment by defendants against the plaintiff having been given in evidence, by way of set-off, the defendants are at liberty to avail themselves of such recovery as an estoppel, if the record so warrant, without regard to the theory of the answer. (*Collyer* agt. *Collins*, 17 *Abb.* 467.)
2. An execution creditor, who, at the sale of his debtor's chattel upon a previous execution, purchased it subject to a mortgage which the officer making the sale assumed to be a valid lien prior to both executions, is estopped from disputing the validity of such mortgage. (*Horton* agt. *Davis*, 26 *N. Y. R.* 495.)

See EVIDENCE, 6.

See DEFENCE, 2.

EVIDENCE.

1. Where the plaintiff, by his own oath, proved that he worked for the defendant 21 days as a carpenter and joiner, for which he had not been paid, and that his services were worth \$2 per day: *Held*, that it was fair to assume that the plaintiff was a carpenter and joiner, and that he worked at defendant's request as such; from which it must be inferred that he was of that trade and calling, and so must be presumed to have been competent to give his opinion of the value of his own services in such trade. (*Potter* agt. *Whittaker*, ante 10.)
2. Where a deed of land is offered in evidence by the plaintiff in a justice's court, to prove the mere fact of the purchase of the land, as evidence of the performance of a condition prece-

dent to defendant's liability upon a written instrument which is the foundation of the action, it is *admissible*, although the title is disputed by the defendant as insufficient to convey the premises. Its admission does not draw in question the title to the premises so as to oust the justice of jurisdiction under section 59 of the Code. (*Nichols* agt. *Bain*, ante 286.)

3. An ordinary invoice or bill of sale, which states in terms that the purchaser has bought of the vendors certain articles or goods at certain prices, and which accompanies the delivery of the goods to the purchaser, cannot be contradicted by *parol evidence* showing that the invoice was delivered in pursuance of a previous parol agreement between the parties that the goods were to be delivered to the purchaser as the agent of the vendors, and to be sold by him *on commission*; and that the title of the goods was to remain in the vendors, with a right to retake them at any time on non-payment of the sales as per agreement. The property held liable to seizure and sale on execution against the purchaser in possession. (*Bonesteel* agt. *Flack*, ante 310.)
4. And it *seems* that the possession of the property in this case—liquors and wines to be sold at retail—being inconsistent with the continued ownership of the vendors, the transaction will be presumed fraudulent as against purchasers and creditors. (*Id.*)
5. An affidavit signed by the adverse party, is properly received to prove admissions, without proof of the authority of the magistrate who administered the oath. (*Morrell* agt. *Cawley*, 17 *Abb.* 76.)
6. Admissions of a party will operate as an estoppel *in pais*, where they are designed to influence the conduct of another, and where a denial of their truth will injure the latter. A party shall be estopped by his admissions, where his intent is to influence another or derive an advantage to himself. But where he has not acted with this view, and there is no breach of faith in receding, he shall not be concluded. (*Young* agt. *Bushnell*, 8 *Bos.* 1.)
7. It is admissible to prove by a witness that a particular debt was included in an assignment of assets made by partners on the dissolution of their firm, and was specified in the inventory

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- prepared for the purpose, without producing the inventory. (*Platt* agt. *Thorn*, 8 Bos. 574.)
8. In an action for a wrongful trespass by a stranger, on the premises held by the plaintiff as a lessee, the plaintiff need not produce the lease. Evidence of possession on his part, under a claim of right by a written instrument, is enough as against a wrongdoer. (*Walker* agt. *Wilson*, 8 Bos. 586.)
 9. In an action for malicious prosecution, a stipulation identifying certain affidavits as the originals upon which a warrant for the arrest of the plaintiff was issued, and admitting therein such arrest, does not authorize the defendant to read such affidavits in evidence. (*Hinskinson* agt. *Giles*, 17 Abb. 251.)
 10. On an issue as to the terms and good faith of a partnership, the instructions given to the conveyancer who drew the articles of co-partnership, are admissible as a part of the *res gestae*. (*Valton* agt. *National Loan Fund*, 17 Abb. 268.)
 11. The *dus execution* of an agreement or bill of sale, in order to be admitted in evidence on the trial, is shown, where the acknowledgment or proof is taken before a commissioner of deeds, accompanied by the certificate of the county clerk of his appointment and authority to act as such commissioner. (*Sheldon* agt. *Stryker*, ante 387.)
 12. Where the commissioner states that the subscribing witness was known to him, it is a substantial compliance with the requirement of the law. It is not necessary that the *precise language of the statute* should be used; the officer cannot certify that he knows the party making the acknowledgment or proof before him, unless he is personally acquainted with him. (*Id.*)
 13. The objection to the certificate of the officer taking such proof or acknowledgment, must be made at the trial; it is unavailable to the party if made afterwards for the first time. (*Id.*)
 14. Our statute in respect to the authentication of the records of the courts of foreign countries relates as well to provincial government as to imperial. It embraces the province of Upper Canada, as well as the kingdom of Great Britain and Ireland. (*Lazier* agt. *Westcott*, 26 N. Y. R. 146.)
 15. The record of a judgment in Upper Canada is, therefore, properly authenticated by the clerk of the court, the secretary of state, and the governor of the province; and our courts will take judicial notice of their existence and authority, without any certification by the imperial authorities. (*Id.*)
 16. The public seal of such a state, attested by the governor-general, proves itself in the same sense and to the same effect as the great seal of Great Britain and Ireland. (*Id.*)
 17. An exemplification of a foreign record is received in evidence without any statement therein, or other proof, that it has been compared and found to be a transcript of the original. All that is implied by the statement by the proper authorities that they have caused the record to be exemplified. (*Id.*)
 18. It is no objection to the reception and force of the exemplification that it contains interlineations and alterations, marked and verified as such by the initials of the clerk of the court. These are to be presumed properly noted by him at the time he authenticated the roll. (*Id.*)
 19. The *postes* in the record stated that the judge presiding at *nisi prius* sent up the record had before him on the 19th of November, 1855, and it appeared that judgment was signed September 26, 1856. It was, therefore, (plainly enough) properly averred in the complaint that the judgment was recovered on the latter day; and if this had been an error, it was amendable at the trial and would be disregarded on appeal. (*Id.*)
 20. The judgment of a foreign court is conclusive upon the merits. The defendant can impeach it only by proof that the court had not jurisdiction of the subject-matter or of his person, or that the judgment was fraudulently obtained. (*Id.*)
 21. Section 399 of the Code of 1862 did not prohibit a party sued by an administrator from testifying to a conversation heard by him between the deceased and a third person. Such hearing is not a transaction between the deceased and the witness. Nor is such evidence prohibited by the Code of 1862: *Per ROSEKRANS, J.* (*Simmons* agt. *Sisson*, 26 N. Y. R. 264.)

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22. The admission of one of the defendants is inadmissible to charge others with whom he is sued, to enforce their personal liability as stockholders of an insolvent corporation. Their liability is several, and not joint: *Per ROSENKRANS and SELDEN, Js. (Id.)*

23. Evidence by an expert that a machine was not constructed in a workmanlike manner is admissible, though the party offering the evidence decline to follow it by proof of the particulars in which the machine was defective. (*Curtis* agt. *Gano*, 26 N. Y. R. 426.)

See ANSWER, 6.

See ACCOUNT, 1.

See MUNICIPAL CORPORATIONS, 5, 9, 10.

See RAILROADS, 2, 6, 7.

See CASE and EXCEPTIONS, 4.

See DIVORCE, 6.

See PRINCIPAL and Agent, 5, 6.

See BILLS OF EXCHANGE and PROMISSORY NOTES, 2.

See EXCEPTIONS, 1, 2.

See MARRIED WOMEN, 1.

See INSURANCE, 2.

See APPEAL, 10.

See REFERENCE and REPORTS, 14.

See JUDGMENT, 10.

See TITLE, 6, 7.

See CRIMINAL LAW, 5, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22.

See CONTRACT, 7, 12, 13, 14, 15, 16, 17.

See NEW TRIAL, 6, 7, 8.

See WITNESSES, 14, 15, 16, 17, 18.

See WILL, 2, 3.

See MORTGAGE of CHATTELS, 7, 8.

See AGREEMENT, 6, 7, 8, 9.

See DEED, 7, 8, 9.

See FRAUDULENT TRANSFER OF PROPERTY, 20, 21.

See SALE, 10.

EXCEPTIONS.

1. A party excepting must, at his peril, place enough in his exceptions to show that the court erred to his prejudice. The legal presumption is in favor of the rectitude of the proceeding; and all decisions made, will be presumed correct, until the contrary appears. (*Van Amringe* agt. *Barnett*, 8 Bos. 357.)

2. When the error relied on consists in the exclusion of evidence offered, the exceptions must show affirmatively that it was relevant at the time when offered and excluded. The court will not interfere on account of its rejection, unless in connection with the evidence previously given, or that and evidence offered to be given, it can be seen to be material. (*Id.*)

3. An exception to the decision of a judge, before whom a cause is tried without a jury, fails, if the conclusions of law stated, and the judgment settled upon the decision, do not pursue the decision in respect to the point excepted to, but are in conformity with the exceptant's views merely. (*Beers* agt. *Waterbury*, 8 Bos. 396.)

4. An exception to incompetent evidence cannot be disregarded on the ground that it must have been harmless, except in very clear cases. (*Weber* agt. *Kingsland*, 8 Bos. 415.)

5. An exception to an order dismissing the complaint at the trial on the close of the plaintiff's evidence, may properly be ordered to be heard at general term in the first instance. (*Lake* agt. *Artisans' Bank*, 17 Abb. 232.)

6. An exception need not be more specific than the conclusion or finding to which it is taken. Thus, where the only conclusion of law was "that the defendant is indebted," &c. *Held*, that a general exception was sufficient to authorize the general term to review the various rulings implied by this conclusion. (*Collyer* agt. *Collins*, 17 Abb. 467.)

See CASE and EXCEPTIONS.

EXECUTION.

1. Upon the death of a plaintiff, after a final judgment in his favor, his personal representatives may bring an action upon the judgment to obtain the same relief as was formerly obtained in such cases by a writ of *scire facias*. The personal representatives

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cannot issue execution by leave of the court; nor can they revive the judgment by a motion under § 121 of the Code. In such an action, by the personal representatives, to revive the judgment and obtain execution thereof, it is in the discretion of the court to allow costs or not. (*Ireland* agt. *Litchfield*, 8 Bos. 634.)

2. Upon an application by the assignee of a judgment for leave to issue execution (under § 284 of the Code), the fact that the judgment-debtor is the owner, by assignment, of judgments to a greater amount against the moving party, is no answer to the motion. (*Betts* agt. *Garr*, 26 N. Y. R. 383.)

3. The right to an execution in such case is a legal one, and it cannot be counter-acted by the allegation of what may be an equitable off-set, without giving the party demanding his legal right an opportunity to controvert the equitable ground, e. g., his insolvency, on which a right to set-off the counter-judgment might be founded. (*Id.*)

4. Upon such an answer to such an application, the most the court should do is to suspend the decision for the purpose of giving time to the party resisting to make his motion to allow a set-off. (*Id.*)

5. The denial of a motion for leave to issue execution in such a case affects a substantial right, and the order is appealable. (*Id.*)

6. It lies with the party alleging that his property was exempt, under the provisions of the Revised Statutes, from sale on execution, to prove the facts affirmatively, which go to establish it. (*Tuttle* agt. *Buck*, 41 Barb. 417.)

7. Until it is made to appear what was the quantity and value of the necessary household furniture retained by a judgment-debtor after a sale of his property upon execution, there is nothing from which any inference can be drawn as to whether the property levied on and sold was exempt or not. (*Id.*)

See *SALE*, 7, 8.

See *ESTOPPEL*, 2.

See *LEVY*.

EXECUTORS AND ADMINISTRATORS.

1. After the expiration of eighteen months from the granting of letters testamentary or of administration, the surrogate, upon the petition of any creditor, legatee, or next of kin, or upon his own motion, may require the executor or administrator to file an account of his proceedings. And a sole acting executor may be required to do so at the instance of a legatee, though the latter is also executrix. (*Woodruff* agt. *Woodruff*, 17 Abb. 165.)

2. On an accounting before the surrogate, the executor or administrator may be required to disclose the assets of a partnership of which himself and the deceased were members at the time of the death of the latter, although the interest of the deceased in the firm is entirely unliquidated. In this respect there is no difference in the authority of the surrogate on an intermediate accounting, under the statute, and on a final accounting. (*Id.*)

3. The recovery of judgment against an executor or administrator for a debt of the deceased, creates no preference. The fact that the suit was commenced against the deceased in his life time, does not alter the rule. (*Mitchell* agt. *Mount*, 17 Abb. 265.)

4. A surviving assignee in trust cannot maintain an action against the executors or administrators of a deceased co-assignee, to require them to account for and pay over money collected by the deceased as such assignee. The *cestuis que trust* are the proper parties plaintiffs. A complaint against executors or administrators, seeking to charge them in their representative capacity, cannot be sustained on demurrer, if the facts alleged show only a personal liability on their part. (*Bartlett* agt. *Hatch*, 17 Abb. 461.)

5. By the will of a foreign testator at his death, or by the issue of letters testamentary, or both, his executors are vested with the title of the testator's bank stock in this state, as well as to all his chattels and personal estate, wherever situate or being. (*Middlebrook* agt. *Merchants' Bank*, ante 474.)

6. The foreign executors thus having the title to the bank stock in this state, have a right to assign it to a purcha-

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- ser, and to execute a power of attorney authorizing the transfer to him. (*Id.*)
7. And the bank refusing to permit such transfer, is liable to the assignee of the executors in an action brought here in his own name. (*This affirms S. C. at special term, 24 How. Pr. R. 267.*) (*Id.*)
8. The purchase at a sale of real estate for the payment of an intestate's debts, by one acting as the agent or for the benefit of the administrator, is void, and the title of the heirs is not affected thereby. (*Forbes* agt. *Halsey*, 26 N. Y. R. 53.)
9. It seems, that chapter 82 of 1850, for the protection of purchasers at sales made by order of surrogates, is constitutional in its retrospective provision as to titles claimed under sales made before the statute: *Per DAVIES, J.; DENIO, Ch. J., and SMITH, J., concurring.* (*Id.*)
10. The evidence necessary to confer jurisdiction upon a surrogate to order the sale of real estate on the application of an administrator, considered and discussed, *per DAVIES, J.* (*Id.*)
11. Although the administratrix of a vendor has no concern with the real estate of the intestate, still she is competent to adjust and recover the balance due on a contract of sale made by him in his life time. And where, upon such an adjustment, she agreed with the vendee, in writing, to procure the title, give further time, and take his mortgage for a portion of the unpaid purchase money, and afterwards procured and tendered to him a deed conveying the title, and demanded performance: *Held*, that on his refusal to take the conveyance and execute the mortgage, she might maintain an action in equity to compel payment of the balance of the purchase price. (*Schroepfel* agt. *Hopper*, 40 Barb. 425.)
12. An ordinary action at law cannot be maintained, in this state, against foreign executors, as such, since the office of executor *de son tort* was abolished by statute. But this objection to the action is matter of defense. It cannot be urged on a motion to set aside the summons. (*Metcalf* agt. *Clark*, 41 Barb. 45.)
13. An executor takes his title to the testator's estate by virtue of the execution of his will, not by the probate of it. (*Peterson* agt. *Chemical Bank*, ante 491.)
14. The authority of an administrator with the will of the decedent annexed, is coextensive with that of the executor, whose place he takes. (*Id.*)
15. A foreign executor or administrator need not produce his letters in order to bring an action for the recovery of chattels converted, except to prove his title on the trial, if contested. The right of possession draws to it in contemplation of law, the constructive possession invaded by the wrong-doer; and there is no need of stating the mode of acquiring title. So in actions upon choses in action negotiable by delivery, the same rule prevails. (*Id.*)
16. The assignee and purchaser of a negotiable chose in action from a foreign executor or administrator, with the will annexed, can recover in his own name in our courts from a debtor resident here. (*See to the same effect Middlebrook* agt. *The Merchants' Bank*, ante p. 474.) (*Id.*)
- See SURREGATE, 1, 2, 3, 4, 6, 7.
See ATTORNEYS, 1, 2, 3, 4, 5, 6, 7, 8.
See COSTS, 6.
See INSURANCE, 11, 12, 13.
See MORTGAGE, 2, 3, 4.
See REFERENCES AND REPORTS, 16, 17.
See CORPORATIONS, 2, 3, 4, 5.
See ATTACHMENT, 2.

FOREIGN CORPORATIONS.

1. The act (ch. 234 of 1845), in relation to suits against foreign corporations, does not undertake to establish any new liability on the part of stockholders or debtors of such corporations, but only provides for subrogating creditors of the corporation, proceeding against it by attachment in this state, to such rights as the corporation itself, under the local law, or the *lex loci contractus*, might have enforced against the stockholder or debtor. (*Seymour* agt. *Sturgess*, 26 N. Y. R. 134.)
2. In an action, therefore, against an alleged debtor of a Maryland corporation, in which no statute of Maryland

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was proved, affecting his liability, it is to be determined by the common law. (*Id.*)

3. The corporation being created for the private benefit of its projectors, and not for any public object, no contract to pay for its stock any further sum than that required upon the original subscription is to be implied from such subscription, or from taking certificates of stock stating the further payments to which the stock might be subjected by order of the director. (*Id.*)

4. The effect of such certificate is to give the holder a title conditional upon his making further payments, if called, but leaves such payment optional with him. (*Id.*)

5. The by-laws requiring the assent of five directors to call upon the stockholders; the facts that the defendant was a director, that no call was made, and that the company became insolvent, when the amount which remained due upon its stock and subject to call was more than sufficient to pay all its debts, do not establish any personal liability against such director. (*Id.*)

6. The act (ch. 463 of 1853) for the incorporation of life insurance, and in relation to the agencies of foreign companies, repeals so much of chapter 95 of 1851 as required the deposit by foreign companies of \$100,000 with our comptroller. (*People* agt. *New England Ins. Co.*, 26 N. Y. R. 303.)

7. After such repeal, any foreign company was at liberty to withdraw the securities deposited by it; and although they remain on deposit in this state, it is not liable to taxation thereon as money invested in business in this state. (*Id.*)

See *BANKS*, 5, 6, 7, 8, 9.

FRAUDULENT REPRESENTATIONS

1. In an action to recover damages for inducing the plaintiffs, by false and fraudulent representations, to sell and deliver goods to a third person, it is not essential to a right of action that the misrepresentations were the sole inducement to the sale. It is enough that the plaintiffs would not have parted with their goods, if the false representations had not been made. (*Shaw* agt. *Stine*, 8 *Bow.* 157.)

2. Where goods are fraudulently purchased with a preconceived design not to pay for them, the purchaser

does not acquire title, and the defrauded vendor may recover possession of them from him, or any one claiming under him, not being a bona fide purchaser for value. It is not indispensable that any representation should have been made; it is enough that the goods were obtained with the fraudulent intent not to pay for them, and under any circumstances which deceived, and which it was designed should deceive the vendor and induce him to part with the possession of the goods. (*King* agt. *Phillips*, 8 *Bow.* 603.)

See *ARENST*, 8.

See *DEED*, 5.

See *PRINCIPAL AND AGENT*, 9.

FRAUDULENT TRANSFER OF PROPERTY.

1. In an action by W. for taking and detaining goods, brought against a sheriff who justified under process in favor of the creditors of an insolvent firm, M. M. & Co., who had transferred the property levied on to W., in payment of an alleged claim of W. against M. M. & Co., the charge of the judge wherein he said: 1. If the goods had been transferred to W. with the intent to hinder, delay or defraud the creditors of M. M. & Co., &c., then the transfer is void and the creditors of M. M. & Co. could attach the goods. (*Walsh* agt. *Kelly*, ante 359.)

2. A transfer of goods by one who is indebted or insolvent, or whether insolvent or not, with the premeditated design and intent to defraud some creditor of his, and to deprive him of the ability to collect his debt, may be under such circumstances, that if the goods be followed, the law will regard it as an actual fraud between him and his vendee. (*Id.*)

3. An illustration of this may exist in a combination between two, one to sell goods and the other to buy them, for the very purpose of preventing a third person from collecting his debt, and it may be done where one of the parties shall be a creditor, if so done with the intent and design to defraud; such a charge is a valid exposition of the law in answer to requests of the counsel for the sheriff, who desired the judge to charge:

4. *First*. That the transfer of property to hinder, delay or defraud the creditors of the person making the transfer,

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- was fraudulent and void, even if made upon the consideration of an honest debt, provided the transferee had notice of the fraudulent acts of the person making the transfer; and
5. *Second.* That notice of such facts as would lead a prudent person to inquire into the motives of the vendor, was sufficient evidence in that respect. (*Id.*)
6. The vendee's knowledge of facts and circumstances, tending to prove a fraudulent motive on the part of the vendors, need not be sought for or inferred from obscure or doubtful indications in the case at bar. If such a motive existed, the evidence implicated the vendee as much as the vendors. (*Id.*)
7. Where the question was whether there was an agreement between them to defraud the other creditors of the vendors, or else the sale was for the honest purpose only of satisfying the debt due to the plaintiff, in such case, there is no room to charge the plaintiff with notice of a fraudulent intent on the part of the vendors, from facts and circumstances, where it is plain that if there was any such intent the plaintiff was "art and part" in it. Where the judge also directed the jury to inquire whether the vendors had a fraudulent intent, and if they had, that the sale was void, and so charged, without the qualification, that the sale was not supported by the consideration of an honest debt, or that the vendee had notice from facts and circumstances of a fraudulent motive on the part of the vendors, his charge, was in these respects, more favorable than the request. (*Id.*)
8. The judge is right in refusing to charge a proposition based on facts which are questions for the jury in the case to determine. (*Id.*)
9. A firm composed of three members has no right to apply its property to the payment of the debts of two of its members. If it is so transferred, it is subject to seizure under attachments issued at the suit of creditors of the whole firm. A question put to a witness, "Were you a member of the firm of W. & Co.?" does not relate only to a conclusion of law, if it did, the question was clearly inadmissible; but there might have been an agreement on the subject, in which case the inquiry would have been competent and could not be excluded. (*Id.*)
10. The answer of the witness, that he did not consider himself a partner, amounted to nothing as evidence, it being his opinion. It would be stricken out on request. (*Id.*)
11. A question put to the witness, "Did your firm of M. M. & Co. own the said stock of goods, or any interest therein?" calls for a fact and not a conclusion merely. It was the office of the cross examination to discover whether the witness stated in his answer a fact or conclusion of law. Both the above questions were admissible. (*Id.*)
12. In an issue of title as between an alleged fraudulent vendee and a sheriff, levying by virtue of attachments against the alleged fraudulent vendor, it is improper to inquire into the character of certain goods taken from the store of the vendors to the store of another firm in New York. The character of those goods could have no apparent relation to the title of the goods transferred to the plaintiff. (*Id.*)
13. On inquiry, also, whether one of the alleged fraudulent vendors made an application to a party for a loan of money to his firm, and stated his firm must fail unless they obtained the loan, was improper, because, even if the plaintiff did know that the firm of M. M. & Co. was in failing circumstances, yet that knowledge will not *per se* render it unlawful for him, if he was a creditor, to receive a transfer of goods from the failing firm in satisfaction of a demand. No legitimate inference can be drawn from the proposed evidence that the transfer to the plaintiff was fraudulent. (*Id.*)
14. A judgment record in such an action, after verdict, in favor of plaintiff, valuing property at \$2,750, and for \$401 damages, in which the award is made for \$3,151 damages and costs, is bad in form and must be corrected. But the error is not ground for a new trial where the verdict is correct. The record, in such case, may be amended by the general term, after appeal and argument, so as to conform to the Code. Form of such an amendment and order given. (*Id.*)
15. A conveyance by a person indebted at the time, with intent to continue his business and to avoid the payment

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of debts to be subsequently contracted, is fraudulent and void as to such subsequent debts, the debts existing when it was made, not having been wholly paid long before the failure of the grantor. When a deed is made with intent to defraud creditors by one at the time in debt, and who subsequently continues to be indebted, it is fraudulent and void as to all such subsequent, as well as existing creditors. (*Savage* agt. *Murphy*, 8 *Bow*. 75.)

16. An individual who has voluntarily parted with his goods to a fraudulent purchaser, under circumstances which would vitiate the sale as against the latter, must, on reclaiming his property, protect from loss a purchaser in good faith from the fraudulent vendee. In such case it is the duty of the purchaser to give to the original owner of the goods all the information in his possession, to enable the owner to obtain his rights; if the latter omit or neglect to take the remedies open to him, the further liability of the purchaser ceases. (*Trigg* agt. *Hitz*, 17 *Abb*. 436.)

17. One who was entitled to logs which he had cut upon the land of another, under an agreement that they were to be his when he paid a certain sum, greatly inferior to their value as logs, sold them, without disclosing his defect of title. The vendee, after learning the facts, agreed to pay upon a deduction being made from the price upon other grounds than the defect of title. This was a waiver of defence on the ground of fraud. (*Sweetman* agt. *Prince*, 26 *N. Y. R.* 224.)

18. Assuming that the vendor was guilty of deceit, and that the vendee had not waived his defense, whether he could set it up, not having been disturbed in the possession by the person having the legal title, and not having offered to return the property to the vendor, *quære*: *Per MARVIN, J.* (*Id.*)

19. The vendee of chattels may, it seems, voluntarily, yield possession to a claimant, and recover against the vendor on the implied warranty of title, upon showing that the claimant had title paramount: *Per MARVIN, J.* (*Id.*)

20. In actions involving questions of fraud, the intent is always a material inquiry; and for the purpose of establishing that, other acts of a similar character, done about the same time,

may always be shown. (*Amaden* agt. *Manchester*, 40 *Barb.* 158.)

21. Hence, in an action to set aside a conveyance made by a debtor in fraud of his creditors, evidence showing what other property he had, at or before the time, and the value thereof, and that he had conveyed the same to different grantees, without consideration, and with intent to defraud his creditors, is admissible, on two grounds: 1st: To show the situation of the debtor, in respect to his property, at the time of the transaction alleged in the complaint to be fraudulent, and what has been done with the property he previously had; and 2d. For the purpose of establishing the fraudulent intent charged in the complaint. (*Id.*)

22. Where C. having obtained from F. and his wife, without consideration, a conveyance of a farm, upon a parol promise or agreement to take and hold the title until F.'s debts were arranged or paid, and then to convey the land to F.'s wife; *Held*, that he could not resist the claim of F. and wife that the parol agreement be specifically executed, on the ground that the conveyance was made by F. to hinder, delay and defraud his creditors; or on the ground that the agreement was within the statute declaring all parol trusts relating to land void. (*Freelove* agt. *Cole*, 41 *Barb.* 318.)

23. If parties engaged in the perpetration of a fraud or concurring in the fraudulent purpose, as *particeps criminis* are *in pari delicto*, neither can have relief, as against the other, at law or in equity. But as there are degrees of crime and wrong, the courts can and do give relief in many cases, as against the more guilty party. To exclude relief in such cases, the parties must not only be *in delicto* but *in pari delicto*. (*Id.*)

See INTERPLEADER, 1.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 9, 10.

See POSSESSION OF PERSONAL PROPERTY, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

HABEAS CORPUS.

1. The supreme court, like the late court of chancery, exercises a general control over all minors. This power is for the benefit of the child, and is not

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- to be defeated by one having a mere legal title to the custody of the child, whether that title or right arise from a natural relationship or from an act of law. Where a father has voluntarily suffered the custody of his children to be committed by indentures, to third persons, upon whom the indentures are binding, the court will restore them to him unless it is for the benefit of the children not to do so. (*People ex rel. Johnson* agt. *Erbert*, 17 Abb. 395.)
2. The judges of the state courts have no power to issue a writ of *habeas corpus*, or to continue proceedings under it when issued, in cases of commitment or detainer, under the authority of the United States. (*In the matter of Charles E. Hopson*, 40 Barb. 34.)
 3. Thus, where the return to a writ of *habeas corpus* alleged that the defendant had been duly appointed provost marshal for the 21st district of New York, under the act of congress of March 3, 1863, that the person alleged to be illegally detained was arrested as a deserter from the army, by him, as marshal, and was held in accordance with the act, to be delivered to the nearest military command or post; and that he was thus held "under the authority of the United States;" Held that the return was sufficient in law, and that the defendant was not bound to bring the body of the prisoner before the justice, on the ground that a state court or judge had no jurisdiction to inquire into the fact alleged in said return, that the prisoner was a deserter. The writ of *habeas corpus* was accordingly discharged, and the prisoner was directed to remain in the custody of the provost marshal, to be dealt with according to law. In such case the prisoner's remedy is to apply to a judge of the U. S. courts, for a writ of *habeas corpus*, to ascertain whether he is illegally detained. (*Id.*)
 2. The statutes of 1862 do not relieve the husband from liability for the debts of the wife contracted before marriage, or for her *toris*, whether committed before marriage or during coverture; nor do they abrogate the common law rule or provision of the Code, which requires that the husband be joined with the wife in actions against her for such debts, or for her *toris*. (*Id.*)
 3. Husband and wife are not in general admissible as witnesses for and against each other. (*Moffat* agt. *Mount*, 17 Abb. 4.)
 4. Where a bill of exchange is drawn by the husband payable to his wife, her indorsement of it gives the indorsee a title to it upon which he can recover against the acceptor. The wife in such case is made the agent of the husband to receive the money, and with the necessary authority to indorse and transfer the bill. (*Lee Bank* agt. *Satterlee*, 17 Abb. 6.)
 5. Deeds of present separation, between husband and wife, are valid so far as relates to the trusts and covenants by which the husband makes provision for the wife, and the indemnity given to the husband by the trustee. Such covenants are mutual and dependent. (*Wallace* agt. *Rossett*, 41 Barb. 92.)
 6. An action may be maintained by a borrower against husband and wife jointly, to recover back money paid as usurious interest, where the money loaned, and the security taken therefore, belonged exclusively to the wife, as a part of her legal estate, and the money taken for the loan and forbearance was paid to and received by her, and the husband, so far as he participated in the transaction, acted for her and with her knowledge and assent. (*Porter* agt. *Mount*, 41 Barb. 561.)

INJUNCTION.

- HUSBAND AND WIFE.
1. In an action of libel against a married woman, her husband must be joined as a party defendant with her. And where process has been served on the wife only, she will be entitled to a stay of proceedings in the action until the husband has been served, or brought in as a party with her. (*Horton* agt. *Payne*, ante 374.)
 1. Where an injunction is granted on an order to show cause, before answer, the defendant is not precluded on the coming in of the answer, from moving to dissolve the injunction upon the answer, although he appeared and opposed the granting of the injunction upon the matter of the complaint and the moving papers alone. (*Hazard* agt. *The Hudson River Bridge Co.*, ante 298.)
 2. An injunction to restrain the defendants from erecting a bridge across the Hudson river at Albany, N. Y., under

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- an act of the legislature, on the alleged ground that the proposed bridge will substantially impede or obstruct the free navigation of the Hudson river—not on the ground of the unconstitutionality of the act, should not be granted, except upon evidence reasonably clear and satisfactory that the law is about to be violated. (*Id.*)
3. This case presents itself in this form: The complaint was verified by a party, not assuming to have and not likely to have precise knowledge of the plan or dimensions of the contemplated bridge; it averred in some respects positively, and in others on information and belief, that the defendants threaten and intend to build their bridge upon a particular plan, and of particular materials, which, to some extent was specified; and asked a full and minute disclosure from the defendants of the precise plan and model of the proposed bridge. (*Id.*)
 4. The answer was verified by a leading officer of the company, likely, from his intimate connection with the directors, and the records and papers of the defendants, to have full and accurate knowledge of the model and materials of the proposed structure, although not disclosing, as asked by the complaint, the precise plan and model of the bridge, positively denied that it was to be of the form, dimensions or character specified in the complaint, or similar thereto. (*Id.*)
 5. Held, that the omission of the answer to give the precise plan and model of the proposed bridge, although a matter of regret, was not sufficient to authorize the court to assume that the allegations of the complaint in that regard are substantially correct. (*Id.*)
 6. Held also, that the whole equity of the bill being denied by the answer, the foundation on which the injunction rested was taken away; and this, according to equity practice, is good ground for dissolving the injunction. (*Id.*)
 7. The general averments of the complaint, that any bridge whatever (except a suspension bridge), built in conformity with the other requirements of the act, would violate that requirement of the act which forbids any substantial obstruction to navigation, were met by the defendants by saying that the legislature by prescribing certain regulations as to the manner of building the bridge, have, in effect, declared that a compliance with those regulations, will exempt the bridge so far from the imputation of making substantial impediments to navigation. (*Id.*)
 8. Section 324 of the Code applies as well to injunction orders as to other orders. The special provision made by section 225, is in addition to the powers conferred by section 324, and is not a substitute for them. Hence, a judge of this court, or a county judge, has power, on *ex parte* application, to vacate or modify an injunction order made by himself without notice. (*Peck* agt. *Yorks*, 41 *Barb.* 547.)
 9. But this power is not to be used under all circumstances, without regard to the rights of parties to be affected thereby; nor should it be left to each judge to determine for himself under what circumstances he will exercise it. (*Id.*)
 10. A judge should never vacate or modify an injunction order, without notice, except when, from the urgency of the case, it is necessary to guard against serious loss which sometimes may be occasioned by the delay incident to serving notice. (*Id.*)
 11. Where the application to modify an injunction order was not made till more than a year had elapsed after service of the injunction upon the defendants, or some of them, and not till after all of them, except one, had appeared and answered, it was held that an *ex parte* order modifying the injunction, without notice, was improvidently granted. (*Id.*)
- See ASSIGNMENT FOR BENEFIT OF CREDITORS, 18, 19.
- ### INQUEST.
1. The court has power to set aside inquests, and to open defaults in its discretion, for the purpose of attaining justice by a fair trial, even after open and confessed negligence. An inquest should be set aside, unless the court can be fully satisfied that the defendant had no evidence which would materially reduce or defeat the recovery. (*Leighton* agt. *Wood*, 17 *Abb.* 177.)
- ### INSOLVENT'S DISCHARGE.
1. A discharge under insolvent proceedings, commonly called the two-third act, is *personal*, and does not operate

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- to discharge a *joint obligor* with the insolvent. (*Ellsworth* *agt. Caldwell*, ante 188.)
2. Therefore, where the plaintiff, the owner of a joint judgment against the defendants, obtained for a partnership debt, relinquishes or assigns the judgment to the assignees of one of the defendants, by petition in insolvent proceedings under the statute, and such defendant subsequently obtains his discharge in such proceedings, the plaintiff cannot afterwards enforce his judgment against such insolvent. (*Id.*)
 3. But such proceedings do not affect the liability of the other joint judgment debtors; and the judgment may be enforced against them notwithstanding such discharge of the co-defendant. (*Id.*)
 4. In case, however, the remaining defendants should subsequently pay the judgment, they could enforce contribution from the insolvent defendant—such judgment creating a demand arising after the discharge. (*Id.*)
- ### INSURANCE.
1. In a time policy on a vessel, there is no implied warranty of seaworthiness, except at the port of departure. The failure to make necessary repairs at an intermediate port, does not, as a matter of course, discharge the insurer. (*Hathaway* *agt. Sun Mu. Ins. Co.* 8 *Bow.* 33.)
 2. A survey is admissible in evidence, on the question of the conduct and good faith of the master. And when it is stipulated that the statements therein contained are true, and shall have the same effect as evidence, and be subject to like objections as if deposed to under a commission, the statements of such survey, as to the condition of the vessel, the nature and extent of the injury to her, and the necessity of further repairs before proceeding on a particular voyage, are competent evidence. (*Id.*)
 3. Misrepresentations as to the pecuniary condition of an applicant for a life insurance, made to the medical examiner selected by the insurers, do not invalidate the policy. (*Valton* *agt. National Loan Fund*, 17 *Abb.* 268.)
 4. A mutual insurance company, organized under the general law (ch. 308 of 1849), may divide its business and risks into distinct departments, or classes, pledging the premiums received in each department as the primary fund for the payment of losses in that department. (*Sands* *agt. Boutwell*, 26 *N. Y. R.* 233.)
 5. Whether a provision is valid which exempts premium notes received in one department from liability to assessment for losses incurred in another department, *quars.* (*Id.*)
 6. The receiver of an insolvent corporation organized under this act may include in his assessment a reasonable sum for the expenses of making and collecting the same. In the absence of any proof to the contrary, ten per cent upon the amount of losses assumed to be a reasonable charge for such expenses. (*Id.*)
 7. Where the by-laws required the notice of assessment to be published in one newspaper in the county of M, "and in such other newspapers as the directors may deem necessary," it seems that a publication in one newspaper in M. county is sufficient, unless a direction for further publication by the directors be shown. (*Id.*)
 8. Whether the statute (ch. 369 of 1864), authorizing directors of a mutual insurance company, organized under the general act, to give notice of an assessment "in such manner as they shall see fit, or as the by-laws shall have prescribed," vests any discretion in the directors, or in a receiver upon insolvency, where the by-laws prescribe the mode, *quars.* (*Sands* *agt. Sanders*, 26 *N. Y. R.* 239.)
 9. A general assessment, and notice that each premium note of every class is assessed for the full amount thereof, is sufficient where the losses in the class to which the note belonged exceed the amount of all the notes received upon that class of risks, and the losses of the company exceed what is collectable on all the notes of all classes and dates. It is unnecessary that the assessment should state the particulars of the assets and debts, upon which it is founded. (*Id.*)
 10. Personal notice of the assessment and a demand of payment, less than the statutory time of publication previous to the time of bringing suit, does not aid a defect in such publication. (*Id.*)
 11. Upon the death of one who has effected an insurance against fire of his house, the interest in the policy de-

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- volves upon his heirs-at-law, and, in case of loss, the damages accrue to them. (*Wyman* agt. *Wyman*, 26 N. Y. R. 253.)
12. Where the policy runs to the assured, his executors or administrators, the personal representative may, it seems, maintain an action, as trustee, for those beneficially interested in the real estate. (*Id.*)
13. The damages recovered stand in the hands of the administrator, not as personal assets, but as realty, subject to dower and to the lien of creditors by judgment before distribution among the heirs-at-law. (*Id.*)
14. An insurance corporation, in the absence of any statutory restriction, has the power to borrow money, and, as incident thereto, the power to transfer its assets in trust for the security of the lenders. (*Nelson* agt. *Eaton*, 26 N. Y. R. 410.)
15. A certificate of persons appointed by the comptroller, under the general insurance act of 1863, to examine into the affairs of a company about to be organized, stating that the company has its capital in cash and bonds and mortgages, "as appears to our satisfaction by the evidence of the fact produced to us," is insufficient. The commissioners must certify that the bonds and mortgages possessed by the company as capital are such as are required by the eighth section of the act. (*Matter of the World's Safe Insurance Company*, 40 Barb. 499.)
16. If the funds of a company substantially equal the amount of the capital, either in cash or in the kind of securities pointed out in the eighth section of the statute, it should be allowed to continue its business, so far as respects the question of the sufficiency of its funds. If they substantially fall short, the company should be dissolved. This is not a question of discretion. (*Id.*)
17. It is enough, however, to prevent the dissolution of a company, within the spirit of the act, if the assets are sufficient at the time of the hearing before the referee, though insufficient at the time when the application for a dissolution was presented. (*Id.*)
18. An insurance company, although authorized to receive notes for advanced premiums to be written against, and to allow a certain interest thereon, is not authorized to allow five per cent. on the whole amount, without deductions for such sums as may be written against. (*Chestrough* agt. *Wright*, 41 Barb. 28.)
19. An agreement to that effect is illegal, and the note cannot be recovered on by the company. But as the statute does not make the note void, a third person, receiving it before it became due, for a valuable consideration and without notice of the illegal agreement, will be entitled to recover. (*Id.*)
20. But merely receiving a note in part payment of a precedent debt does not constitute a parting with value, which will render the holder a *bona fide* holder for value. (*Id.*)
- See REFEREES AND REPORTS, 15.
See MARRIED WOMEN, 3, 4.
See MORTGAGE, 8.
See FOREIGN CORPORATIONS, 6, 7.
See TRUSTEES, 2, 3, 4, 5.
See COMPLAINT, 19, 20.
- ### INTERPLEADER.
1. An action of interpleader cannot be maintained by the purchaser of goods to settle the conflicting demands of his vendor, and a stranger, who claims the purchase money on the ground that the vendor had obtained the property from him by fraud. Interpleader is allowed only to those who are in danger of loss by an inability to determine to whom the money or property in question belongs. It must appear that the plaintiff is ignorant of the rights of the respective claimants; nor can he assert such ignorance where his liability to one of the parties rests upon an estoppel. (*Trigg* agt. *Hütz*, 17 Abb. 436.)
2. A debtor who has been served with a notice that an attachment has been granted against the property of his creditor, has no standing in court to interplead his creditors and the plaintiff in the attachment. (*United States Trust Company* agt. *Wiley*, 41 Barb. 477.)
3. Where a trust company received a sum of money on deposit, and issued a certificate to the depositors, by which it agreed to allow interest at the rate of four per cent., and to repay the sum deposited, to the depositors or their assigns, with interest, on sixty days notice; *Held* that the company could not bring a suit, to compel

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the depositors, and creditors who had attached the funds in the plaintiff's hands, to interplead in respect to their respective rights and equities in the fund. (*Id.*)

IRRELEVANT AND REDUNDANT MATTER.

1. Allegations which can in no aspect of the case made by a pleading be material, are irrelevant and should be stricken out on motion. In pleading, the fact to be established by evidence must be averred, not the evidence itself. (*Cahill* agt. *Palmer*, 17 *Abb.* 196.)

JOINT DEBTORS.

1. A discharge under insolvent proceedings, commonly called the two-third act, is *personal*, and does not operate to discharge a joint obligor with the insolvent. (*Ellsworth* agt. *Caldwell*, ante 188.)
2. Therefore, where the plaintiff, the owner of a joint judgment against the defendants, obtained for a partnership debt, relinquishes or assigns the judgment to the assignees of one of the defendants, by petition in insolvent proceedings under the statute, and such defendant subsequently obtains his discharge in such proceedings, the plaintiff cannot afterwards enforce his judgment against such insolvent. (*Id.*)
3. But such proceedings do not affect the liability of the other joint judgment debtors: and the judgment may be enforced against them notwithstanding such discharge of the co-defendant. (*Id.*)
4. In case however, the remaining defendants should subsequently pay the judgment, they could enforce contribution from the insolvent defendant—such judgment creating a demand arising after the discharge. (*Id.*)
5. Although, under the Code, a plaintiff may recover against one defendant out of several, upon his several contract, notwithstanding the former has alleged it in his complaint to be joint, he cannot deprive a defendant, served with process, of the right of having judgment entered against them all, to be enforced against their joint property under § 136 of the Code, *whether they are served with process or not.* (*Niles* agt. *Battershall*, ante 381.)

6. Particularly not, by first adding them as parties on the record to prevent an answer in *abatement*, and then dropping them in the judgment, without any leave of the court or notice to the defendant served. (*Id.*)

7. Where A. in pursuance of a parol authority from B. purchases stock in his own name, on the joint account of himself and B., the latter becomes the owner of one half of the stock, and liable to pay A. the amount advanced therefor. No written assignment of the stock from A. to B. is necessary to render B. liable for his proportionate share of the purchase money. (*Stover* agt. *Flack*, 41 *Barb.* 162.)

8. Where A. buys and pays for stock at B.'s request, on joint account, under an agreement that B. shall pay him for the moneys advanced, A. holding the stock in the mean time as a pledge for repayment, with a right to expose it for sale in the market, if upon notice B. refuses to pay for it, A. is not bound to sell the stock in market, if it be worthless, before commencing a suit against B., to recover the amount advanced on the purchase. Such an agreement, though by parol, is not void by the statute of frauds. (*Id.*)

See MORTGAGE, 2, 3, 4.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 15, 16.

JUDGMENT.

1. As an original question it is clear that the *entry of judgment* on a verdict forms no bar to a motion at special term for a *new trial on a case*, whether it be entered to stand as security or not. (*The authorities holding to the contrary, though regarded as perhaps binding until reversed, disapproved.*) (*Tucker* agt. *White*, ante 97.)
2. The party against whom the verdict was rendered, and who had served a case in time, allowed (notwithstanding there was no stay of proceedings, and unconditional judgment had been entered), to proceed to have the case *settled*, with a view to bringing up the question of practice in such form that it might be determined hereafter, if necessary, so distinctly as to require it to be passed upon by the court of appeals, as involving a substantial right. (*Id.*)

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3. Where a satisfaction piece of a judgment has been given and filed conditionally, the court may nevertheless order the judgment to be satisfied absolutely. (*Ward* agt. *Beabe*, 17 Abb. 1.)
4. Under § 174 of the Code, which provides for relief in cases of mistake, the court has power at any time within one year to relieve against a judgment suffered by mistake, surprise, inadvertence or excusable neglect. (*Macomber* agt. *Mayor, &c., of New York*, 17 Barb. 35.)
5. A judgment roll, on failure to answer, must contain proof of due and timely service of the summons. A voluntary appearance in an action gives jurisdiction and cures defects in previous process, but will not justify a judgment on failure to answer without proof of the actual service of the summons. (*Id.*)
6. On an application by the comptroller of the city of New York to set aside a judgment by default against the city, entered upon a voluntary appearance without proof of timely service of the summons, the merits of the action being doubtful, *held*, that the want of proof of service of summons entitled the defendant to have the judgment vacated, and that defendants should be allowed to plead or answer without terms. (*Id.*)
7. Although under § 311 of the Code, which provides for insertion of costs in judgments, the judgment be entered before the adjustment of costs, failure to comply with this rule is not sufficient ground to justify setting aside the judgment, if otherwise regular. (*Id.*)
8. The provision of § 161 of the Code applies, in pleading the judgment of a court of record of a sister state; and it is sufficient to allege that the judgment was duly recovered, without stating the facts, conferring jurisdiction. (*Halstead* agt. *Black*, 17 Abb. 229.)
9. A party cannot claim the benefit of a judgment, and at the same time appeal from it. (*Kelly* agt. *Bloom*, 17 Abb. 229.)
10. A copy of a judgment rendered by a justice of the peace, and of the proceedings to recover the same, signed by the justice, with his official signature, and proved by the testimony of a witness to be a correct copy, must, in a collateral action, be regarded as

proof of the rendering of the judgment, and of the various proceedings by which it was obtained. (*Wilkinson* agt. *Vorce*, 41 Barb. 370.)

- See EXECUTORS AND ADMINISTRATORS, 3.
- See JOINT DEBTORS, 1, 2, 3, 4, 5, 6.
- See COUNTY COURTS, 1, 2.
- See DIVORCE, 8.
- See ARREST, 1.
- See SALE, 7.
- See ANSWER, 6.
- See DEFENCE, 3.
- See CONTRACT, 6.
- See EVIDENCE, 14, 15, 16, 17, 18, 19, 20.
- See JUSTICES' COURTS, 11, 12, 25, 26, 27.

JURISDICTION.

1. Where a justice's return shows, by fair intendment, that all the jurisdictional steps were taken necessary to a valid judgment before him, that he issued a summons, which was served by a constable personally on the defendant, enough is stated to raise the presumption of regularity as to the form of the summons and its due service on the defendant. If any error occurred, it is the duty of the party alleging it to make it appear to the court on appeal, as no presumption of error will be indulged against the regularity of the judgment. (*Potter* agt. *Whittaker*, ante 10.)
2. The writ of prohibition issues out of this court to restrain subordinate court and inferior judicial tribunals from exceeding their jurisdiction. Where a court of oyer and terminer has jurisdiction touching contempt, this court has no right to interfere touching the practice of that court, by writ of prohibition or otherwise. (*People ex rel. Greely* agt. *Court of Oyer and Terminer*, ante 14.)
3. Where a deed of land is offered in evidence by the plaintiff in a justice's court, to prove the mere fact of the purchase of the land, as evidence of the performance of a condition precedent to defendant's liability upon a written instrument which is the foundation of the action, it is admissible,

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although the title is disputed by the defendant as insufficient to convey the premises. Its admission does not draw in question the title to the premises so as to oust the justice of jurisdiction under section 59 of the code. (*Nichols* agt. *Bain*, ante 286.)

4. Where an action is brought in a justice's court, to recover damages as claimed in the complaint at \$100, and on the trial a verdict is rendered for the plaintiff for \$30—no evidence being given which laid the damages beyond \$50: On *appeal* to the county court, the cause is properly triable there before a jury; as it is the amount of the *claim* in the pleadings, and not the amount of *recovery* in the court below, which confers jurisdiction on the county court under § 352 of the code. (*Ovenshire* agt. *Ades*, ante 368.)

See COMPLAINT, 15.

See JUDGMENT, 8.

See HABEAS CORPUS, 1.

See JUSTICES' COURTS, 9, 10, 14.

See COUNTY COURTS, 9.

JURORS.

1. A juror, who is not a freeholder, nor assessed in respect to any personal estate, should not be allowed to sit as a juror, although it may appear that he is worth in personal property over and above all debts, \$250.

JUSTICES' COURTS.

1. Where it appears in the return of a justice of the peace that he issued a *summons*, giving the names of the plaintiff and defendant therein, and also the time and place of its return, the court will presume that the summons was in the *proper form*; and an objection that it does not appear that it was directed to any constable of the county of (the proper county), is not tenable. If there is any informality in the process, it lays with the party objecting to make it appear. (*Potter* agt. *Whittaker*, ante 10.)
2. An objection that it does not appear that the person serving the summons was a constable of the county of (proper county), cannot prevail; where it appears from the justice's return that he issued a summons, directed to any constable of the county of (the proper

county), which was returned with a return thereon indorsed, that the same was personally served by W. Carpenter, constable. Such a return is to the effect that the summons was served by a constable of the proper county, and also that it was served *within* the county. (*Id.*)

3. Where a justice's return shows, by fair intendment, that all the jurisdictional steps were taken necessary to a valid judgment before him, that he issued a summons, which was served by a constable personally on the defendant, enough is stated to raise the presumption of regularity as to the form of the summons and its due service on the defendant. If any error occurred, it is the duty of the party alleging it to make it appear to the court on appeal, as no presumption of error will be indulged against the regularity of the judgment. (*Id.*)

4. Where a deed of land is offered in evidence by the plaintiff in a *justice's court*, to prove the mere fact of the purchase of the land, as evidence of the performance of a condition precedent to defendant's liability upon a written instrument which is the foundation of the action, it is *admissible*, although the title is disputed by the defendant as insufficient to convey the premises. Its admission does not draw in question the title to the premises so as to oust the justice of jurisdiction under section 59 of the Code. (*Nichols* agt. *Bain*, ante 286.)

5. Where an action is brought in a justice's court, to recover damages, as claimed in the complaint at \$100, and on the trial a verdict is rendered for the plaintiff for \$30—no evidence being given which laid the damages beyond \$50: On *appeal* to the county court, the cause is properly triable there before a jury; as it is the amount of the *claim* in the pleadings, and not the amount of *recovery* in the court below, which confers jurisdiction on the county court under § 352 of the Code. (*Ovenshire* agt. *Ades*, ante 368.)

6. The *grounds of appeal* stated in a notice of appeal from a justice's judgment in the following form, was held sufficient, especially the first and fourth statements, to wit: *First*—The judgment should have been for the plaintiff for at least \$15 damages, besides costs, instead of being against him for costs. (*Saunders* agt. *Keough*, ante 477.)

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7. *Second*—The justice erred in admitting improper evidence on the part of defendant, after proper objections were made to the same by the plaintiff. *Third*—The justice erred in excluding proper evidence offered on the part of the plaintiff. *Fourth*—The judgment is without evidence, and contrary to law. *Fifth*—The judgment is against both law and evidence. (*Id.*)
8. *It seems* that the notice of appeal in these cases was intended, as one object, to dispense with the *formal affidavit* which was formerly required in order to bring a writ of *certiorari*; and this object would be defeated to a great extent, if the same precision was necessary to be stated in the notice of appeal as was required by such affidavit. (*Id.*)
9. A long summons, issued by a justice's court against a non-resident, is not a nullity, though the statute (ch. 300 of 1831, § 33), declares that, in such case, the justice shall have no jurisdiction. (*Clapp* agt. *Graves*, 26 N. Y. R. 418.)
10. The defendant waives the irregularity, and gives jurisdiction as to his person, if he appears and pleads to the complaint without objection to the process. (*Id.*)
11. The omission to annex an affidavit to a confession of judgment, in a justice's court, as required by the statute, renders the judgment void as to *creditors* only. It is valid and binding upon the *defendant*, notwithstanding such omission. (*Stone* agt. *Williams*, 40 Barb. 322.)
12. A justice of the peace has the same authority to receive a confession of judgment at the defendant's house, in the town of the justice's residence, as he has to receive it at his own house. And if the defendant appears before the justice at the former place and signs the confession in his presence, the presence or absence of the justice's docket, at that time and place, will not affect the jurisdiction of the justice. (*Id.*)
13. Upon an appeal to the county court from a judgment rendered in a justice's court, where the amount of the plaintiff's claim litigated in the latter court exceeds \$50, the appellant being entitled to a new trial as a matter of right, there is no reason for requiring particularity in the statement of the grounds of appeal, in the notice of appeal. Hence an allegation, in the notice, that the judgment is against law and evidence is, in such cases, a sufficient compliance with the requirement of section 353 of the Code, that the grounds of appeal shall be stated in the notice of appeal. (*Fowler* agt. *Westervelt*, 40 Barb. 374.)
14. An action upon a promise to discontinue a suit, is to be deemed an action on a contract of which a justice has jurisdiction; notwithstanding an averment in the complaint that the defendant falsely and fraudulently promised the plaintiff that he would discontinue the action. Previous to the amendment of section 53 of the Code, in 1862, justices of the peace had not jurisdiction of actions on the case for fraud in obtaining a judgment. (*Farrington* agt. *Bullard*, 40 Barb. 512.)
15. The limitation of time, in the statute directing that justices of the peace shall render judgment and enter the same in their dockets within four days after the submission of the cause, was intended for the convenience of the parties and the protection of their rights; and a compliance with the statute may be varied by them. (*Barnes* agt. *Badger*, 41 How. 98.)
16. When any act is deferred beyond the time limited in the justice's act, by the consent of the parties, it is no error that the act is done after the time specified in the act, if done within the agreed time. (*Id.*)
17. If a justice proceed, without having acquired jurisdiction over the parties in the form and in the manner required by law, any judgment which he may render will be absolutely void. (*Sagendorph* agt. *Shutt*, 41 Barb. 162.)
18. The day and hour fixed in the summons for its return, is the period when the justice takes jurisdiction of the action, and not the time when he issues the summons. At the return day he is to receive the complaint, which shows the cause of action; and at that time the question of jurisdiction of the action is judicially determined. (*Id.*)
19. The authority exercised by the justice, previous to that stage of the cause, in issuing the summons, is merely ministerial. (*Id.*)
20. When a legal summons, issued by a justice of the peace, has been duly

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- served and returned, the justice, after waiting an hour from the time named in the summons for the appearance of the parties, obtains jurisdiction of the person of the defendant, whether he be present or not. (*Id.*)
21. A venire should not be delivered to a constable, by a justice of the peace, until the parties have had an opportunity to make all reasonable objections to such officer. (*Rice* agt. *Buchanan*, 41 Barb. 147.)
22. Where a venire was issued by a justice on the demand of the defendant, out of court and in the absence of the plaintiff, and was delivered to the constable without the knowledge of the plaintiff, or any notice to him of the application therefor; *Held*, that the justice was right in setting aside the venire, and the panel of jurors returned by the constable, and in issuing a new venire. (*Id.*)
23. Where a judgment is rendered by a justice of the peace who is related to either of the parties, it is absolutely void. (*Schoonmaker* agt. *Clearwater*. 41 Barb. 200.)
24. The statute having declared that no judge of any court "can sit" in such a case, all the acts of the justice are *coram non jure* and of no effect whatever; and this, although no objection was made to the exercise of jurisdiction at the trial, and no proceedings have been had to set aside or vacate the judgment. (*Id.*)
25. One serving a summons issued by a justice of the peace under a special authority given to him by the justice, is to be deemed a constable *quasi* the action, and is prohibited from appearing and acting as counsel for the plaintiff on the trial. (*Wilkinson* agt. *Force*, 41 Barb. 370.)
26. His appearance on the trial is an error for which the judgment and proceedings will be reversed, on appeal. But it will not affect or take away the jurisdiction and authority of the justice to proceed in the action. (*Id.*)
27. The justice having acquired jurisdiction of the person of the defendant, and become completely possessed of the action, by the issuing and service of a summons in the manner required by law, his judgment rendered in such action, will, until reversed, be valid and effectual, and good authority for the issuing of an execution, notwithstanding such irregular appearance for one of the parties. (*Id.*)
28. Where a justice of the peace, after he renders judgment and enters it in his docket, and after the time limited by statute for rendering judgment has expired, undertakes to correct an error therein by adding an additional sum for costs, but afterwards erases such addition, and restores the docket to its original form, such alterations being void acts, do not affect the validity of the judgment. (*Dauchy* agt. *Brown*, 41 Barb. 555.)

LANDLORD AND TENANT.

1. Buildings and fixtures erected by a tenant, become real estate, and are governed by the laws which regulate land descending to the heir as a part of the inheritance, or passing by deed as part of the freehold, in all cases except where a right of removal has been reserved, or where the buildings and fixtures were erected for the purposes of trade. This rule applied against the mortgagees of a tenant, claiming the damages which had been awarded to the owner of the freehold, on a demolition of the building as a street improvement. The failure of the tenant, in such case, to pay rent and perform the covenants of a lease, *held*, a bar to the action. (*Kessens* agt. *Barclay*, 17 Abb. 360.)
2. In an action by the plaintiffs for the rent of a building, and a *claim* by the defendants for injuries arising from the entrance of water into the sub-cellar, founded on a covenant of guaranty by the plaintiffs against such injuries, is made in the answer by way of *set-off*, and a prayer is also contained therein for judgment for the excess of their damages beyond the rent claimed by the plaintiffs; the claim of the plaintiffs is substantially admitted, and the rights of the defendants to damages for breach of such covenant, as well as the pleadings and evidence in relation thereto, are to be governed by the same rules as if they were plaintiffs in an action on such covenant. (*Benckard* agt. *Babenck*, ante 391.)
3. The judge at the trial properly instructed the jury that the defendants could not claim for any injury resulting from dampness not caused by percolation of water into the sub-cellar—the injury covenanted against. Any necessary natural dampness, incident

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- to the location of the sub-cellar, or its construction, and not affected at all by water getting through the walls or floor of the sub-cellar, was a consequence which the defendants themselves must bear. (*Id.*)
4. A lessor cannot recover against a third person for the use and occupation of premises, unless he shows a *surrender of the original lease*. (*Bedford agt. Terhune, ante 422.*)
 5. In the absence of any evidence of the bargain under which defendants entered into possession of the premises, and it appearing that they occupied the whole of the unexpired term of the lease to the original lessees: *Held*, that the fair presumption was, that they entered for the whole of such unexpired term, and as such interest is given not by an under-lease, but by an *assignment*, the presumption must be that the defendants were in as *assignees*, and not as under-tenants. But if they were in as under-tenants, they would not be liable to the lessor for the rent, either in an action on the lease, or for use and occupation. (*Id.*)
 6. Where in an action for *use and occupation* to recover by the lessor of the defendants a quarter's rent of premises, and it appeared from the evidence that the defendants occupied as assignees of the lease, *held*, that although the plaintiff could not sustain his action for use and occupation, upon which judgment was rendered in his favor in the court below, but must recover, if at all, upon the *covenants in the lease*; yet this court, on appeal, was authorized to decide that the court below was at liberty on the trial to *amend the complaint so as to conform it to the proof*; and by thus holding that the defendants were liable, as assignees of the term, for the rent claimed, the judgment of the court below was affirmed. (*Id.*)
 7. That is, this court on appeal, in an action originating in a justice's court, for *use and occupation*, to recover on a *quantum meruit*, an amount of rent, will change the action to that of *covenant on a lease*, to recover the rent specified by the lease, where the proof on the trial shows that the latter action only can be sustained. (*Id.*)
 8. A tenant of a store or shop for a term of years, who erects a *wooden shed* or *awning* over the sidewalk in front of and adjoining the building, the full width of the sidewalk, for the convenience of his business, has the right, as the owner of such woodshed or awning, to remove it from the demised premises at the expiration of his term. (*Devin agt. Dougherty, ante 455.*)
 9. The fact that the tenant built the woodshed or awning during his first term, and that he took subsequently a renewal of the lease for another term, without any reservation of such fixtures, did not affect his rights as the owner thereof. (*Id.*)
 10. At common law, and independently of the statute (ch. 345 of 1860), the lessee of apartments in the upper story of a building, where there is no covenant, by either landlord or tenant, to rebuild, is discharged from his covenant to pay rent by the burning of the building so that his enjoyment of the space in air demised to him becomes thereby impracticable. (*Graves agt. Herdan, 26 N. Y. R. 496.*)
 11. Otherwise, *it seems*, where the demise is such as to give the tenant an interest in the soil, and to authorize him to rebuild, so that thereby, or otherwise, he may have some beneficial enjoyment of the demised premises. (*Id.*)
 12. A perpetual annual rent, reserved on a conveyance in fee, passes under a devise of all the testator's tenements and hereditaments. (*Van Rensselaer agt. Reed, 26 N. Y. R. 558.*)
 13. The legal right of action on a covenant for the payment of such rent passes to the assignee of the rent at common law, independently of the act of 1865 (ch. 98; 1 R. S., p. 747, §§ 23, 25), or of the Code. (*Id.*)
 14. The action is maintainable on the privity of estate which subsists between the grantee of the rent and the grantee of the land out of which it issues, although there is no reversion in the former or his grantor. (*Id.*)
 15. If any difficulty had existed, prior to the Code, in supporting such an action, it would have been removed by the provisions abolishing the objection of maintenance and merging legal and equitable remedies, so far as relates to forms. (*Id.*)
 16. As chapter 98 of 1865 related only to the remedy, and an abundant remedy exists independent of its pro-

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visions, the partial repeal of that statute by chapter 396 of 1860 is constitutional. (*Id.*)

17. The statute abolishing distress for rent (ch. 274 of 1846, § 3,) recognizes the assignable quality of a condition of re-entry for non-payment of rent reserved in a grant in fee, and gives to an assignee of the rent the same right to maintain ejectment as was conferred by chapter 98 of 1805, repealed in 1860 (ch. 396), as to grants made prior to its passage. (*Van Rensselaer* agt. *Slingerland*, 26 N. Y. R. 580.)

18. Where a tenant in common of real estate takes a lease of his co-tenant's moiety, for a term, subject to a specified rent, and continues in possession of the premises after the expiration of his term, he will not be considered as *holding over* under the lease, and thus liable to an action for use and occupation, the presumption of law being that he is in possession under his own title; and such presumption will prevail unless there be evidence that he holds as tenant to his co-tenant. (*Dresser* agt. *Dresser*, 40 Barb. 300.)

19. Where a lease executed by the Mayor, &c., of New York, to R. and others, was upon the condition that the lessees should erect on the demised premises such a building as was described in a certain petition and resolution of the common council; and at the expiration of the term quit and surrender the premises in as good state and condition as reasonable wear thereof would permit. The rent reserved was nominal only. *Held*, that the future owners by the lessors, of the building to be erected by the lessees, was in the contemplation of the parties at the time the lease was executed; and that at the expiration of the term the lessors became the owners of the superstructure which had been erected in pursuance of the condition of the lease, and had an insurable interest therein. (*Mayor, &c., of New York* agt. *Brooklyn Fire Ins. Co.*, 41 Barb. 231.)

20. Where a tenant agreed by parol, with his lessor, that he would turn out hay and grain to secure the payment of the rent reserved in the lease, if the lessor was afraid that she would not get her pay; the value of the property being over fifty dollars, and nothing being paid, and no receipt or credit actually given or possession delivered; *held*, that the transaction

rested in words merely, and no title passed. (*Id.*)

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 3, 4.

See COUNTER CLAIM, 2.

See DAMAGES, 1, 2.

See CRIMINAL LAW, 15, 16.

LEVY.

1. A levy upon goods in a store, under an execution, is a continuing levy covering goods purchased by the judgment-debtors subsequent to the levy and during the life of the execution, and placed in the same store; such goods being of the same general description as those levied on, and having been purchased to supply the place of goods sold by the debtors, after the levy, or as an addition to the original stock. (*Roth* agt. *Wells*, 41 Barb. 194.)

2. Goods and chattels of a judgment-debtor, situated within the jurisdiction of the sheriff, are bound by the lien of the judgment from the time of the delivery of the execution, and no levy is essential to create such lien. (*Id.*)

3. Goods levied upon, being in the custody of the officer, if a portion of them are removed and sold by the debtor, and others of a similar description are put in the same place, the property substituted takes the place of that which has been taken away, and becomes subject to the lien of the execution, without any new levy. (*Id.*)

4. If, under such circumstances, the debtor refuses, when called upon, to designate the property which he claims is not covered by the levy, he will be estopped from maintaining an action against the sheriff to recover the value of property taken by him under the execution. (*Id.*)

5. Where goods levied on are left by the officer with the judgment-debtor, and he confounds them with other goods belonging to him, so that they cannot be distinguished, and the debtor refuses to point out the property levied on, he cannot complain if some of his own goods, not embraced in the levy, are taken by the sheriff. (*Id.*)

See SHERIFF, 5.

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MALICIOUS PROSECUTION.

1. A judgment in favor of the plaintiff in a justice's court, after a trial upon the merits, is sufficient evidence of probable cause to defeat an action against him for malicious prosecution, although on appeal to the county court it is reversed upon another trial. It is not, however, conclusive evidence of probable cause, but may be impeached for fraud, conspiracy, perjury or subornation. Where no such evidence is offered to impeach the prior judgment, it is the duty of the court to order a nonsuit. (*Palmer agt. Avery*, 41 Barb. 290.)
2. The plaintiff is not competent to prove by his own oath, against that of the defendant, that the former judgment was obtained against him by the perjury of the defendant, when the question depends upon their credibility as witnesses. (*Id.*)
3. Where, in consequence of the plaintiff's failure to appear before the justice, two actions have gone down at the adjourned day, and a new action has been commenced before another justice for the same demand, which is still pending, the litigation is not terminated; and want of probable cause cannot be inferred solely from the discontinuance of the former suits. (*Id.*)
4. After a full and fair trial of such new suit upon the merits, it resulted in a judgment in favor of the plaintiff; it furnishes sufficient evidence of probable cause to defeat an action brought by the defendant therein against the plaintiff, for malicious prosecution of the prior suits. (*Id.*)

MANDAMUS.

1. When the relator in mandamus takes issue on the return to the alternative writ, instead of demurring, he cannot afterwards question its legal sufficiency. If the verdict is against him, the peremptory writ must be refused. There is no judgment *non obstante* in such a proceeding. (*People agt. Board of Metropolitan Police*, 26 N. Y. R. 316.)
2. The duty of the supervisors of the city and county of New York, under the acts of 1861, 1862 and 1863, to proceed with the construction of the new county court house being clear, and they having passed a resolution for the payment of the laborers employed thereon, and a warrant for the amount having been drawn by the

comptroller, which the mayor refused to countersign: *Held*, that it was a proper case for a peremptory mandamus against the mayor. (*People agt. Opdyke*, 49 Barb. 396.)

MARRIED WOMEN.

1. The admissions of a married woman are competent evidence in an action against her. (*Morrell agt. Canoley*, 17 Abb. 76.)
2. A married woman may be sued in all matters respecting her separate estate, the same as if she were single. And this rule applies to the form of the action as well as the parties. (*Id.*)
3. Terrifying a woman so as nearly to produce hysterics by threats of prosecuting her husband for alleged embezzlement, is such coercion as to avoid a transfer of her separate property thus obtained. (*Eadie agt. Simmons*, 26 N. Y. R. 9.)
4. A policy of insurance to a married woman, made under chapter 89 of 1849, for her benefit and that of her children in case of her death, cannot be transferred so as to divest the interest of the wife or her children. (*Id.*)
5. Since the act of 1849, for the protection of the rights of married women, it seems that no acknowledgment is requisite to a conveyance of the separate estate of one. (*Wiles agt. Peck*, 26 N. Y. R. 42.)
6. A married woman, carrying on trade as an unmarried woman, in her own name, after the passage of the acts of 1848 and 1849, relative to the rights of married women, bought goods for her trade and gave her own notes for part of the bill to the sellers, who were ignorant of her coverture. After her husband's death she promised the sellers to pay the notes and the residue of the price of the goods: *Held*, that the consideration sufficed to support the express promise, and that the action could be maintained. (*Goulding agt. Davidson*, 26 N. Y. R. 604.)
7. Where the defendant, being indebted to H., his mother, gave her his promissory note for the amount, payable to the plaintiff, and the same was, by the direction of H., given to the plaintiff as a gift to her, and as separate property; she being at the time a married woman: *Held*, that the plaintiff could maintain an action upon the note, in her own

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- name, alone; and that in such action counter-claims against her husband could not be allowed. (*Paine* agt. *Hunt*, 40 Barb. 75.)
8. Where a husband has expressly forbidden a person to give credit to his wife, in order to render the husband liable for subsequent supplies, it is incumbent on the parties so forbidden to show affirmatively that the husband did not supply his wife with necessities suitable to her condition in life. *BOCKES*, J. dissented. (*Keller* agt. *Phillips*, 40 Barb. 396.)
9. The power conferred upon married women to devise real and personal estate, by the act of April 11, 1848, amending the act of April 7, 1848, for the more effectual protection of the property of married women, was not repealed by the act of March 20, 1860, concerning the rights and liability of husband and wife. (*Wallace* agt. *Bassett*, 41 Barb. 92.)
10. A married woman, having a separate estate in lands, but not in rents and profits thereof, not conducting any business on her own account, cannot charge such separate estate by parol promise to pay the debt of her husband, where her separate estate has received no benefit on account of the contracting of the debt, and will not be benefited by the payment of the debt. (*Ledlie* agt. *Vrooman*, 41 Barb. 109.)
11. Since the act of 1848, in relation to the rights of married women, when the wife is in possession of property under claim of ownership, her rights as owner cannot be overlooked without evidence, any more readily than if she were unmarried. (*Peters* agt. *Fowler*, 41 Barb. 467.)
12. The statute has worked this change; and instead of an adverse presumption that the property connected with a business which she carried on before her marriage, and which she claimed to own as a single woman, with the property in her possession, belonged to the husband, the presumption is now in her favor, and must be overcome by the party who disputes her right or title. (*Id.*)
13. The fact of coverture has ceased to have any relation to the technical right of a married woman to maintain an action in respect to her separate property; and the allegation of coverture in the complaint, is no longer necessary. (*Id.*)
14. A husband is legally bound for the supply of necessities to his wife, so long as she does not violate her duty as wife. He may discharge this obligation by supplying her with necessities himself or by his agents, or giving her an adequate allowance in money; and then he is not liable to a tradesman, who without his authority, furnishes her with necessities. But if he does not himself provide for her support, he is legally liable for necessities furnished to her by tradesmen, even though against his orders. (*Cromwell* agt. *Benjamin*, 41 Barb. 558.)

See HUSBAND AND WIFE.

MORTGAGE.

1. A second assignee of a mortgage of land, does not, by recording his assignment, obtain a valid title as against one having a prior unrecorded assignment. A purchaser of a mortgage is not a purchaser of "real estate," within the meaning of the recording act. (*Hoyt* agt. *Hoyt*, 8 Bos. 511.)
2. Where two or more executors or administrators take an obligation to themselves jointly, as representatives of their testator, for a debt belonging to his estate, one of them can receive payment and lawfully discharge the obligation. The same rule applies in the case of an obligation in favor of partners, and a release by one is a discharge of the obligation. (*People* agt. *Keyser*, 17 Abb. 215, court of appeals.)
3. Where a mortgage is given to M. and W., executors of the estate of E., and payable to the "party of the second part, his executors, administrators, and assigns," such appellation is merely descriptive, and the mortgage is the individual property of M. and W. (*Id.*)
4. Under the statute, the register is bound to discharge of record a mortgage in favor of two or more jointly, on receiving a certificate of satisfaction executed and acknowledged by one only of such mortgagees. (*Id.*)
5. Where a mortgage is given to secure the payment of a bond, an assignee suing to foreclose the mortgage must show an assignment to him of the bond, as well as of the mortgage. It is well settled that a mortgage passes by an assignment of the bond to which it is collateral, on the ground that the

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- incident follows the principal debt, but the bond does not pass by an assignment of the mortgage. The assignment of the mortgage without the bond, in such case, is a nullity. (*Cooper* agt. *Newland*, 17 *Abb.* 342.)
6. The purchaser of a bond and mortgage who fails to require the production of the bond, is chargeable with notice of any defect in the assignor's title thereto. (*Kellogg* agt. *Smith*, 26 *N. Y. R.* 18.)
7. A mortgage contained a covenant that the same should not be assigned without the written consent of the mortgagor, or a week's previous notice to him. The mortgagee assigned the mortgage without such consent or notice, and delivered the bond and mortgage to the assignee, who did not record the assignment. He again assigned them to a person, who learned by inquiry that the mortgagor had no notice of any previous transfer, and the second assignment was recorded: *Held*, that the title to the securities was in the first assignee. (*Id.*)
8. The conveyance of a vessel, accompanied by a reconveyance by way of mortgage, does not work a transfer or termination of the mortgagee's interest, within the meaning of a marine policy, providing that it should become void if the insured assigned his interest in the property without the consent of the insurer. (*Hitchcock* agt. *The Northwestern Insurance Company*, 26 *N. Y. R.* 68.)
9. The act of Congress of July 29, 1850, for the recording in a collector's office of mortgages of vessels, does not supersede a State law requiring the record of such mortgage with a State officer as the condition of its validity against third persons. (*Ætna Insurance Company* agt. *Aldrich*, 26 *N. Y. R.* 92.)
10. *Held*, accordingly, that the mortgage of a vessel recorded in the collector's office at Chicago, where the parties resided, was void as against a creditor in this State, because not recorded as required by the law of Illinois. (*Id.*)
11. The discharge of a mortgage of record, and the possession of the instrument, with the accompanying bond, canceled, by one not the mortgagor but the owner of land charged with its payment, is *prima facie* evidence of the payment by such holder. (*Braman* agt. *Bingham*, 26 *N. Y. R.* 483.)
12. A subsequent mortgagee, who takes his mortgage expressly subject to a prior mortgage which is liable to be defeated by the mortgagor, as invalid, as contravening a public statute, cannot avoid it for his own benefit, and thus acquire a better lien than he contracted for. (*Hardin* agt. *Hyde*, 40 *Barb.* 435.)
13. Where a mortgage debt has been paid by the owner of the fee of the land, who had assumed and covenanted to pay it, when he purchased the premises; such payment is a satisfaction of the mortgage, and extinguishes the lien and vitality of the mortgage as fully as payment by the mortgagor would have done. And the owner of the premises, by taking an assignment of the mortgage on such payment, instead of a discharge, cannot keep the mortgage alive for his benefit, by any arrangement with a subsequent assignee of the mortgage. (*Kellogg* agt. *Ames*, 41 *Barb.* 518.)
14. A release of the lien of a mortgage, though void at law if not under seal, may be enforced in equity. (*Headley* agt. *Gowdrey*, 41 *Barb.* 279.)
15. Where one conveys land to another by deed absolute on its face, and the grantee, while thus apparently invested with the legal title, mortgages the land to a third party for a valuable consideration, the title of a mortgagee cannot be divested by proof that the grantee in the deed held the premises merely in trust for another, without any interest therein, at the time he assumed to execute the mortgage thereon. (*Newton* agt. *McLean*, 41 *Barb.* 235.)
16. To overreach the mortgage so given by the holder of the legal title, which vests the mortgagee with a legal estate in the premises, the person claiming to be the equitable owner of the premises is bound to go further than simply to show his prior equity. He must show that the mortgagee had notice of such prior equity, before advancing the consideration for the mortgage. (*Id.*)

MORTGAGE OF CHATTELS.

1. Where the property embraced in a chattel mortgage is left in possession of the mortgagor, a son of the mortgagee, pursuant to an agreement be-

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- tween them, that the mortgagor may go on with it as before, and sell it, so as to support his wife and children, the mortgage thereby becomes fraudulent and void. (*Marston agt. Vulture, 8 Bos. 129.*)
2. Where a debtor makes, at one time, several mortgages upon the same chattels to secure several creditors, the refusal of one of them, on being informed of the mortgage made to him, to accept it, does not impair the mortgages accepted by the other creditors. (*Brown agt. Platt, 8 Bos. 324.*)
 3. The objection that a chattel mortgage, executed in another state, was void for illegally reserving the right to retain possession, and to sell the goods as part of the mortgagor's stock in trade, cannot be raised on appeal from a judgment, if not taken at the trial. (*Id.*)
 4. On refileing a chattel mortgage, a statement of the mortgagee's interest is sufficient, which annexes and refers to another document filed with it, if the two papers, read together in connection with the original mortgage, disclose the interest of the mortgagee intelligibly. On refileing a chattel mortgage, if the statement of the mortgagee's interest does not include all the liabilities intended to be secured by the renewal, but only a part of them, the renewal of the mortgage will be good only as against the liabilities mentioned in the statement. (*Beers agt. Waterbury, 8 Bos. 396.*)
 5. The purchasers of chattels which are secured by a chattel mortgage, who consume or sell a part of the property, so that what remains is insufficient to satisfy the mortgage debt, may be held personally liable for the deficiency. (*Id.*)
 6. In an action by a mortgagee of chattels to foreclose the mortgage and to obtain a personal judgment for the debt, subsequent purchasers of the mortgaged property cannot avail themselves of a demand in favor of the mortgagor against the mortgagee, as a counter-claim. (*Id.*)
 7. A chattel mortgage may be sustained by evidence that its real consideration was the indorsements by the mortgagee of the mortgagor's note for \$1,000 for the accommodation of the latter, and, upon his failure to raise money thereon, of two notes for \$500 substituted in its place, although the consideration stated in the mortgage was a present absolute indebtedness of \$1,000, and no such indebtedness existed, and no money was advanced. (*McKinster agt. Babcock, 28 N. Y. R. 378.*)
 8. In such a case, evidence is admissible that the mortgagee indorsed the substituted notes of \$500 in reliance upon the mortgage as security therefor, and that it was the purpose of the mortgage to secure any such substituted liabilities. (*Id.*)
 9. If a person bids off, at a sheriff's sale on execution, property of the judgment debtor, embraced in a chattel mortgage previously executed by such debtor—the sale being subject to such mortgage—and subsequently purchases and takes an assignment of the mortgage, this will not operate as a payment or satisfaction of the mortgage. And if the mortgage has not been paid or foreclosed, nor any power contained in it exercised, at the time of its transfer, it will be a valid, subsisting, unsatisfied mortgage; and no fraud can be imputed to the assignee in representing and claiming that it is unpaid. (*Brown agt. Rich, 40 Barb. 28.*)
 10. The purchaser in such a case can either pay off the chattel mortgage and thus protect his purchases under the execution, or purchase it and take an assignment, and protect himself in that manner. If he pays off the mortgage it will be extinguished, and cannot be enforced against any other property contained in it. If he does not pay it, but takes it by purchase and assignment, it is an operative and valid instrument in his hands. (*Id.*)
 11. Where the mortgagee of a chattel mortgage, by its terms, has the right to sell the mortgaged property to the highest bidder, that will fix the amount to be applied upon the debt by means of that security, and the balance will remain to be collected of the mortgagor by action. (*Olcott agt. Tioga R. R. Co., 40 Barb. 179.*)
 12. The sale, by virtue of a chattel mortgage, is wholly optional with the mortgagee. If the debt is not paid at the time specified, his title becomes absolute, so that no tender made afterwards will defeat it, and the mortgagor can then only redeem by the aid of a court of equity. The mortgagee may then keep the property, without selling it under the mortgage, and in case he does so, if it be of sufficient

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value, it extinguishes the mortgage debt. But if it be of greater value than the amount of the debt, and there is no sale, the mortgagor has no legal claim for the excess of such value. (*Id.*)

13. The mere possession by the mortgagor of personal property for more than a year of the forfeiture of the mortgage, with the assent of the mortgagee, does not enable the former to give a good title, in the absence of authority to sell, nor does it make the mortgagee guilty of that species of negligence or misconduct which should estop him from afterwards asserting his title as against a third person, who voluntarily, but in ignorance of the true title, assists the mortgagor in the wrongful conversion of the property. (*Dudley agt. Hawley*, 40 Barb. 397.)

14. A mortgage or sale at law of future acquired personal property, the mortgagor neither having acquired the things, nor the agent of its production, at the time of making the contract, creates no valid subsisting property. But if the future acquired property be the product of present property in the mortgagor, as the wool-growing on a flock of sheep, or the produce of a dairy, or a farm, or anything of that character, the mortgage will take effect upon the property as soon as it comes into existence, and will be perfectly binding at law. (*Conderman agt. Smith*, 41 Barb. 404.)

15. Where one purchases property covered by a chattel mortgage within a year after the mortgage is made and filed, the property will continue subject to the lien of the mortgage so long as the purchaser continues the owner, even though the year has expired without the filing in the town clerk's office of a copy of the mortgage, with a statement of the interest of the mortgagee in the property. (*Wiles agt. Clapp*, 41 Barb. 645.)

16. One deriving title to mortgaged property from a purchaser who becomes such within the year will stand in the same position as his vendor. (*Id.*)

17. But if he merely takes the property for an antecedent debt, without paying or advancing anything at the time, or giving up any security, he will not be regarded as a *bona fide* purchaser, or purchaser in good faith. (*Id.*)

18. The re-filing of a chattel mortgage in the town where the mortgagor resides

is only necessary to secure the lien against creditors of the mortgagor, and purchasers and mortgagees in good faith. (*Id.*)

MORTGAGE FORECLOSURE.

1. On a reference as to surplus moneys, under Rule 48, the referee can take into account only absolute liens, as distinguished from equitable claims not matured into liens. When he finds a lien regular and valid upon the record, he has no right to go behind it to inquire whether it is irregular, fraudulent or inequitable. Nor when the referee has made his report, can the justice or regularity of the liens be examined upon the evidence taken before the referee. (*Husted agt. Dakin*, 17 Abb. 137.)

2. On a reference to ascertain the claims to surplus moneys, objections cannot be raised to the regularity of proceedings in suits separate and distinct from that in which the reference was had, or to the good faith of the parties to those suits, or of the officers who were executing the process of the court therein. (*Id.*)

3. The surplus moneys arising on a sale of land under mortgage foreclosure, stands in the place of the land in respect to those having liens or vested rights therein. Consequently the widow of the owner of the equity of redemption is entitled to dower in the surplus, as she was in the land before the sale. (*Matheus agt. Duryee*, 17 Abb. 256.)

See STATUTE OF LIMITATIONS, 3, 4.

See SALE, 7, 8.

See COUNTER-CLAIM, 4.

See MORTGAGE, 5.

MOTION.

1. In this case, the *service of motion papers* by the defendant's attorney to set aside an attachment and an order for publication, made upon the *plaintiff's attorney some four years after the entry of judgment in the action*, was held sufficient. (*Drury agt. Russell*, ante 130.)

2. Although relief against irregularities cannot be obtained on a notice of motion not specifying the defects, yet, in proper cases the motion should be de-

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nied without prejudice to its renewal. (*Macomber agt. Mayor, &c. of New York, 35.*)

3. A motion to modify a judgment of the special term, or to excuse the literal performance of its requirement, must be made at the special term—not at a general term. (*Davis agt. Duffie, 8 Bos. 691.*)

See EXECUTION, 2, 3, 4, 5.

MUNICIPAL CORPORATIONS.

1. The city of New York has full power to purchase or sell real estate; and there are no trusts in this respect imposed upon the city, the violation of which, will affect the interests of the people of the state at large. (*People agt. Mayor &c. of New York, ante 54.*)
2. The people of the state have no more right to intervene through their courts and arrest the action of the city in a matter in reference to and over which the authority of the city extends than they have in the case of private corporations or individuals. (*Id.*)
3. If the city, as a corporation, is defrauded in the sale of its real estate, it has its remedies. The people of the whole state are not called upon to take action in their courts for the protection of the interest-rights of the municipal corporation, any more than of such rights of other corporations or individuals. (*Id.*)
4. The laws of 1859, ch. 439, § 5, which authorizes the comptroller to move to open judgments against the city, renders the belief of the comptroller sufficient ground for his intervention. Such belief existing, he is entitled to prosecute any mode of relief which might be claimed by the city; even though fraud and collusion are denied or disapproved. (*Macomber agt. Mayor &c. of New York, 17 Abb. 35.*)
5. The title of a municipal corporation is not sufficiently proved in an action against them, by evidence of a sign upon a building designating it as "primary school No. 11," and that such sign had been on it ten years, and that it was used for a public school during that time. (*Ferry agt. Mayor &c. of New York, 8 Bosw. 504.*)
6. The corporation of the city of New York are not liable either as the creators or as the continuers of a nuisance resulting from defects in a public school building. The board of education and not the corporation, are the erectors and custodians of those buildings. Nor are the corporation, as owners of the Croton aqueduct, liable for injuries which arise from defects in the lateral service pipes inserted by consumers of water in the main street pipes of the aqueduct. (*Id.*)
7. An action will not lie against a municipal corporation to try irregularities in proceedings to take land for public use, and awarding damages to another than the true owner. (*Id.*)
8. The streets of a great city being in constant use by passengers, during the nights as well as the day, if the municipal corporation undertakes a work—such as the construction of a sewer—which necessarily renders the street unsafe for night travel, it is bound to avert the danger to passengers by special precaution, such as signal lights and barriers, and even more than these should they prove ineffectual. (*Grant agt. City of Brooklyn, 41 Barb. 381.*)
9. Where a municipal corporation, in opening a sewer in a street, threw the earth upon a sidewalk usually traveled by foot passengers, and left it there during the night, without any signal light or barrier, or protection erected around or near it, to warn or turn passengers away from the danger, and the plaintiff, while passing along the sidewalk at night, in consequence of the obstructions, fell into a hole and was injured. *Held*, that the corporation was guilty of negligence to which the plaintiff had not contributed, and was liable to the injury occasioned thereby. (*Id.*)
10. In an action to recover damages for a personal injury, resulting in a loss of services, evidence showing how much the plaintiff was earning from his business or realizing from fixed wages at the time of the injury, is admissible. (*Id.*)

See RIOT ACT, 1, 2, 3, 4, 5, 6, 7.

See ATTORNEYS, 9.


See DAMAGES, 1, 2.

See NEGLIGENCE, 5.

NEGLECTANCE.

1. Under a contract with the state authorities the defendants were engaged

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in removing a sunken boat from the channel of the canal, by means of a steam dredging machine, in the vicinity of the plaintiff's farm buildings, using wood for fuel, without any spark catcher or screen upon their smoke-stack. A high wind blowing the sparks and cinders to and over the farm buildings, the defendants were notified by the plaintiff's agent or servant of the danger to said buildings; notwithstanding which, the defendants continued to use their dredge, keeping up the fire thereon without putting on a spark-catcher, or using any extra precaution to prevent injury from fire. The buildings of the plaintiff being consumed by fire, communicated to a pile of straw, by sparks: *Held*, that the defendants were guilty of carelessness and negligence, and were liable for the damages occasioned by the fire. (*Teall* agt. *Barton*, 40 Barb. 137.)

2. *Held*, also, that a question put to a witness, as to whether he considered it dangerous to use a steam-dredge without a spark-catcher, was properly overruled, it not being a question of science or skill, and not falling within the rule relating to evidence by experts. (*Id.*)
3. And, that a question, to a witness, whether he had ever known any accident to happen from sparks from a dredge at the same distance from the dredge, was also properly overruled. (*Id.*)
4. In cases involving mutual negligence, the question whether independent evidence is required of the plaintiff, to establish that he was not guilty of negligence, must depend, greatly, upon the circumstances of each particular case. While in some cases the plaintiff must prove affirmatively, that he did not contribute to the injury, in others the transaction itself, as presented by the evidence, establishes that he did not. *Per MILLER, J.* (*Welling* agt. *Judge*, 40 Barb. 193.)
5. A party who having obtained permission from a municipal corporation to lay gas pipes in a street, makes a contract with another person to do the work, he is liable for the negligence of the servants of the latter, in consequence of which an injury is sustained by an individual. It is the duty of such party to restore the street to a condition of safety to passengers over it; and he cannot avoid the consequences of a failure to do so, by show-

ing that he contracted with others to perform his duty for him. (*McCamus* agt. *Citizens' Gas Light Co.* 40 Barb. 380.)

6. The right of every one to use his own property as he pleases, for all the purposes to which such property is usually applied, is unlimited and unqualified, up to the point where the particular use becomes a nuisance. (*Fisher* agt. *Clark*, 41 Barb. 329.)
7. The turning a person's own sheep, having an infectious disease, into his own lot, adjoining the lot of another occupied by sheep, is not unlawful, nor such an act of wrong or negligence as will give to the owner of the adjoining lots a legal cause of action, for damages sustained in consequence of the disease being communicated to his sheep. (*Id.*)
8. It is the duty of an employer to exercise care and prudence that persons in his employ be not exposed to unreasonable risks and dangers, and the employee has a right to understand that the employer will exercise that diligence in protecting him from injury. (*Connolly* agt. *Fullen*, 41 Barb. 366.)
9. Where the plaintiff, who was not a ship carpenter or joiner, or a mechanic of any kind, and knew nothing about the construction of scaffolding, or the forces it would be required to resist, was put into the hold of a gunboat, by his employer, a ship builder, to remove the chips and rubbish underneath a scaffold; *Held* that he had a right to rely upon the superior knowledge of his employer, and upon his care and prudence that the scaffold was of sufficient strength to insure him against all harm. (*Id.*)
10. *Held* also, that even though the plaintiff himself, in pursuance of his employer's orders, assisted in piling planks upon the scaffold, which fell from the weight so placed upon it, whereby the plaintiff was injured, he was not chargeable with negligence contributing to the injury, so as to defeat a recovery against the employer. (*Id.*)

See RAIL ROADS.

See MUNICIPAL CORPORATIONS, 8, 9, 10.

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NEW TRIAL.

1. As an original question it is clear that the *entry of judgment* on a verdict forms no bar to a motion at special term for a *new trial on a case*, whether it be entered to stand as security or not. (*The authorities holding to the contrary, though regarded as perhaps binding until reversed, disapproved.*) (*Tucker agt. White, ante 97.*)
2. The party against whom the verdict was rendered, and who had served a case in time, allowed (notwithstanding there was no stay of proceedings, and unconditional judgment had been entered), to proceed to have the *case settled*, with a view to bringing up the question of practice in such form that it might be determined hereafter, if necessary, so distinctly as to require it to be passed upon by the court of appeals, as involving a substantial right. (*Id.*)
3. After judgment entered absolutely, a case or exceptions cannot be annexed to the judgment roll for the purpose of review, except by special order. And a motion for a new trial upon a case or exceptions, after judgment entered absolutely, cannot be heard at special term. (*Anderson agt. Dickie, 17 Abb. 83; See Tucker agt. White, supra, adverse.*)
4. It is the duty of the City Court of Brooklyn to grant a new trial where a verdict against evidence has been rendered. (*Suydam agt. Grand St. & Newtown R. R. Co. 17 Abb. 304.*)
5. Where a new trial is had in the county court on appeal from a justice's judgment, upon an issue of fact, under § 366 of the Code, the parties are restricted to proofs under the issue raised in the justice's court. Thus, on such new trial, the county court have not power to allow the defendant to amend his answer by pleading a new defence. (*Savage agt. Cock, 17 Abb. 403.*)
6. Where there is sufficient evidence to sustain the finding of the jury, the court will not grant a new trial on the ground that the verdict was *against evidence*, because the testimony of one witness tended strongly to establish a different result. (*Sheldon agt. Stryker, ante 387.*)
7. The court will not grant a new trial on the ground of *newly discovered evidence*, where such evidence relates to

the most important matters controverted on the trial, and upon which the jury under the charge of the court had rendered their verdict. Such evidence is cumulative merely, and is not a ground for a new trial. (*Id.*)

8. Motions for new trials on the ground of newly discovered evidence will not be granted where the evidence is *cumulative* in its nature, or where a party has been guilty of *laches* in making it, or where the *judgment has been entered*. (*Id.*)

See COUNTY COURTS, 4, 5, 6, 7.

See APPEAL, 8.

NOTICE.

See SUPPLEMENTARY PROCEEDINGS, 1.

See AGREEMENT, 3.

See WAIVER, 5.

See JUSTICES' COURTS, 6, 7, 8, 13.

See MORTGAGE, 6, 7.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 14.

PARTIES.

1. Previous to the code, the non-joinder of a co-promisor could be taken advantage of only by plea in *abatement*. (*Lee agt. Wilkes, ante 336.*)
2. Since the code, a defect of parties can only be taken advantage of by *demurrer*, when apparent on the complaint, or when not, by *answer*. (*Id.*)
3. Although the proof may show a joint liability of the defendant with another, and thus may constitute a variance, yet if the objection is not taken in the mode pointed out by the code, it is one which the defendants shall be deemed to have *waived*. (*Id.*)
4. In an action of *libel* against a *married woman*, her husband must be joined as a party defendant with her. And where process has been served on the wife only, she will be entitled to a *stay of proceedings* in the action until the husband has been served, or brought in as a party with her. (*Horton agt. Payne, ante 374.*)
5. The statutes of 1862 do not relieve the husband from liability for the debts of the wife contracted before marriage, or for her *torts*, whether committed before marriage or during

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coverture; nor do they abrogate the common law rule or provision of the code, which requires that the husband be joined with the wife in actions against her for such debts, or for her torts. (*Id.*)

6. Although, under the code, a plaintiff may recover against one defendant out of several, upon his several contract, notwithstanding the former has alleged it in his complaint to be joint, he cannot deprive a defendant, served with process, of the right of having his co-contractors joined with him, in order to have judgment entered against them all, to be enforced against their joint property under § 136 of the code, *whether they are served with process or not.* (*Niles* agt. *Battershall*, ante 381.)

7. Particularly not, by first adding them as parties on the record to prevent an answer in *abatement*, and then dropping them in the judgment, without any leave of the court or notice to the defendant served. (*Id.*)

8. An action commenced against commissioners for loaning certain moneys of the United States, under the act of April 4, 1837, is in effect an action brought against the state, and not against the commissioners personally. It is therefore absolutely necessary to bring the state before the court, as a party, in the form prescribed by the statute, to enable the court to give any relief to the plaintiff. (*Plumtree* agt. *Draatt*, 41 *Barb.* 333.)

9. If the complaint describes the defendants as "commissioners of loans of the county of W.," the addition to their names will be considered, as merely *descriptio personarum*, and the action will not be deemed as brought against them in their official character as commissioners under the act mentioned. And if the objection is distinctly taken by demurrer, the plaintiff cannot be allowed to proceed in his action, but must amend. (*Id.*)

See BONDHOLDERS.

See RECEIVERS, 1.

See ANSWER, 5.

See WITNESSES, 13.

See ATTORNEYS, 12.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 6.

PARTITION.

1. On a sale in partition, the purchaser, not a tenant in common at the commencement of the proceedings, cannot object to the validity of the sale on the ground that he was not made a party to the proceedings—he holding a deed of a portion of the premises purchased *pendente lite* from some of the heirs, defendants in the partition suit; especially where the deed expressed in terms that the conveyance was made subject to the proceedings in partition. (*Noble* agt. *Cromwell*, ante 289.)

2. Any error in stating in proceedings in partition the precise interests of the parties, or the shares to which they were entitled, is quite immaterial, because the persons interested, where they are all parties to the proceeding, are concluded by the judgment. (*Id.*)

3. There is no rule that requires the referee in his report of title on proceedings in partition to annex to his report a search for mortgages or conveyances, &c., affecting the title; if his report states the fact explicitly that he has caused the necessary searches to be made, and certifies what incumbrances, &c., there are, it is sufficient. (*Id.*)

4. It is not necessary that the referee in these proceedings *advertise for liens*. Such notice is not necessary to be published unless by advice of the court, or it is required by some party to the suit. (*Id.*)

5. The decision in this case (16 *N. Y.* 193), reiterated: that in a suit for partition in equity, no step can be taken, after the death of one of the tenants-in-common, without a revivor; that a sale, after his death, and after the bill had been taken confessed against him, without revivor, is void as against his heirs; that such heirs are not required to avoid the decree for sale by motion in the original suit, writ of error or appeal, but can impeach its validity in an action of ejectment for the land of their ancestor. (*Requa* agt. *Holmes*, 26 *N. Y. R.* 338.)

6. It is no estoppel of the heirs, nor any ratification by them of the sale, that, upon the petition of the representative of their ancestor's grantor, assuming to act also in their behalf, a portion of the proceeds of sale were applied to the payment of a judgment

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against such grantor; nor that, upon the consent of one assuming to act as their solicitor, a portion was invested as a dower fund for the widow of the grantor; nor that after the death of the widow, and pending their action to recover the premises, the heirs received their proportion of the fund so invested. This was no election to take the money instead of the land. (*Id.*)

7. It is not material that the purchaser at the sale in partition made valuable improvements, with the knowledge of the plaintiffs, and without any objection by them. (*Id.*)
8. A deed, conveying to the surviving plaintiffs so much of the interest in the land of a co-plaintiff, who died pending the ejectment, as had descended to two persons not plaintiffs, is not void by reason of the possession at its date of the defendant. (*Id.*)

See ATTORNEYS, 1, 2, 3, 4, 5, 6, 7, 8.

PARTNERSHIP.

1. Where some members of a copartnership, without the knowledge of the others, and contrary to the covenants in the articles of copartnership, engage in other business and use the firm's credit and means therein and appropriate the profits to their own use, they thereby commit a fraud upon the firm. And the other members of the firm, on discovering the facts, may elect to have such business and its profits treated as the business and profits of the firm. And if so claimed and adjudged, in stating an account in respect thereto, those who prosecuted it must be credited with moneys paid for the property used in it. The practice and concealment of such a fraud, and a discovery of it subsequent to a settlement of accounts between the partners, give a right to the defrauded partners to have the account opened, and an accounting in respect to such business. (*Herrick* agt. *Ames*, 8 Bos. 115.)
2. The absolute transfer, by one partner, of the whole property of the firm, to break up the firm, without the consent of the other, which could readily have been obtained or refused, is not within a partner's power. (*Kimball* agt. *Hamilton Fire Insurance Company*, 8 Bos. 495.)
3. Where a complaint on a bill or note alleges that the defendants were partners, and as such made it, an answer simply denying that they made it, admits the partnership. Such answer may be struck out as sham, on proof that one of the defendants made the note in the firm-name. It is not an answer to such a motion to show that the note was made after the dissolution of the firm, if the plaintiffs show a previous course of dealing between them and the firm, and the defendants do not show that plaintiffs had any notice of the dissolution. (*Fairchild* agt. *Rushmore*, 8 Bos. 698.)
4. Where G. had given to W., his partner, a mortgage on the firm property, and subsequently the interest of W. in the property was sold on execution: *Held*, that the purchaser acquired, as against W. and G., not only W.'s interest as a partner, but also his title under the mortgage. A mortgage of partnership property, executed by one partner to secure a debt due by the firm is valid. (*Willett* agt. *Stringer*, 17 Abb. 152.)
5. Where a partner lends trust money to his firm, no debt is created against the joint estate in favor of the *cestuis que trust*, unless the fact of its being trust money is known to the other partners. (*Id.*)
6. Where trust money has been, by the trustee, so appropriated to his own use as to be undistinguishable from his individual means, his creditors, and especially those who have been misled by acts of his, inconsistent with the existence of a trust, are entitled to reach the trust money as his. Although the rights of *cestuis que trust* are more properly to be determined in an action by or against the trustee, yet the court will, in proper cases, allow them to come in and assert their claims. (*Id.*)
7. Where, upon the dissolution of two copartnerships, the defendant executed an agreement to indemnify and keep L. (one of the partners), "harmless from and against all debts due and owing from the late firms," and "to pay all debts due from either of said firms;" *Held*, that under the first clause of the agreement, the covenantor was not liable until something had been paid by L.; but that the last clause contained an absolute and positive covenant to pay the debts, upon which, on the covenantor's failure to pay, the covenantee might recover the full amount of his liability, although he had not been actually damaged. (*Id.*)

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8. *Held, also*, that in the absence of any specification of the time within which the debts were to be paid, in the agreement, the law required payment to be made immediately; or at least as soon as the debts were due. (*Id.*)

9. *Held, further*, that a judgment recovered against L. for one of the partnership debts covered by the indemnity was conclusive upon the covenantor, as to the amount of the damages and costs therein—he having had notice of that suit and having assumed to defend it. (*Id.*)

10. Where a division by partners is made, of the co-partnership assets between themselves, and the transfer of such assets by the individual partners, in payment of their private debts, when the partnership is insolvent, such division is, in point of law, a fraud upon the creditors of the partnership. Such a transfer of the partnership effects is invalid as against the creditors of the firm, and the property remains partnership property until it comes to the hands of a *bona fide* purchaser for a valuable and new consideration. (*Ransom* agt. *Van Deventer*, 41 Barb. 307.)

11. If the person to whom the property is transferred has notice that it is partnership property, and he takes it in payment of a precedent debt, he will not be deemed a *bona fide* purchaser. (*Id.*)

See EVIDENCE, 10.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5, 6.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 11, 12, 13, 14.

See JOINT DEBTORS, 7, 8.

PAYMENT.

1. Before the Code, a payment after suit brought had to be pleaded specially in bar of the *further continuance of the action*, and not in bar of the action generally—the plea was required to have a formal conclusion. The Code has abrogated the necessity for any prayer or formal conclusion; and an answer which sets up payment specially, after suit brought, is good, although it demands that the complaint be dismissed, and judgment for costs. (*Bendit* agt. *Annesley*, ante 184.)

2. In an action on a promissory note, where the defendant on the second

day after the action is commenced, pays the full amount of the note, interest and protest, which is received and kept by the plaintiff, he cannot afterwards recover his costs. If the plaintiff meant to insist on the payment of the accrued costs, he should have refused to receive the payment of the debt unless the costs were also paid. The payment of the principal—the debt, extinguishes the incident, the costs. (*Id.*)

3. Payment and discharge of a mortgage given as collateral security for the payment of a prior mortgage, operates as a payment upon the principal debt. *Prima facie*, there is nothing else upon which the money paid can apply. (*Prouty* agt. *Eaton*, 41 Barb. 409.)

4. Although the defendants, in an action to foreclose a mortgage, fail to set up in their answer, distinctly, the defence of payment, alleging merely an accord and satisfaction, and that nothing remains due: Yet, if evidence, showing that the debt has been paid, is received, without objection, the defendants are entitled to the benefit of such proof. (*Id.*)

See PUBLIC OFFICERS, 2.

See CONTRACT, 8.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5, 6.

PLACE OF TRIAL.

1. Where an action is brought which involves the question whether a conveyance of land is fraudulent as against creditors, the action is not necessarily local, so as to require the place of trial to be laid in the county where the land lies. (*Rawls* agt. *Carr*, 17 Abb. 96.)

POLICE.

1. When the relator in mandamus takes issue on the return to the alternative writ, instead of demurring, he cannot afterwards question its legal sufficiency. If the verdict is against him the peremptory writ must be refused. There is no judgment *non obstanti* in such a proceeding. (*People* agt. *Board of Metropolitan Police*, 26 N. Y. R. 316.)

2. A member of the police force of the city of New York, whom the Metropolitan Police act of 1857 transferred to the new force thereby created, if

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he so elected, need not manifest his dissent by writing or express words, but may vacate the office by withdrawing from the new force, disclaiming to hold office under the act creating it, and engaging in an employment inconsistent with the discharge of its duties. (*Id.*)

3. Such conduct, it seems, if not a refusal to accept, and if the policeman is to be deemed in office without any act of acceptance, is a resignation. (*Id.*)

4. The case of *The People, ex rel. McCunn* agt. *Board of Police* (19 N. Y., 188), considered and distinguished. (*Id.*)

5. The act (ch. 259 of 1860, § 69), amending the Metropolitan Police act, repealed the section under which the relator took or held the office, if at all; and as it restricted the force to those in office at the time of its passage he should have subscribed the oath of office, he cannot be restored to the possession of the office, although he had, in the interim between the two acts, been unjustly removed or kept out of it. (*Id.*)

POSSESSION OF PERSONAL PROPERTY.

1. In an action to recover the possession of specific personal property, or the value thereof in case a return cannot be had, and for damages, the plaintiff may recover damages arising from the depreciation of the goods, during the wrongful detention by the defendant. It is unimportant whether the decrease in value arises from the defendant's act or default, or from other causes. (*Young* agt. *Willet*, 8 Bosw. 486.)

2. Under a complaint alleging that defendant wrongfully took and detained the goods, to the damage of the plaintiff \$5,000, but without any allegation of special damage, the plaintiff may recover damage from depreciation resulting from the lapse of time. (*Id.*)

3. A purchaser of personal property, though in good faith and for a valuable consideration, obtains no title from a person who wrongfully took the same from the owner. (*Ross* agt. *Cassidy*, ante 416.)

4. He is bound to deliver the property to the owner on demand, if it be still

under his control, or to account to him for its value, if he have parted with it. (*Id.*)

5. The fact that the purchaser had, before demand, sold the property in good faith, without knowledge of the claim, cannot affect the owner's right to hold him responsible for it. (*Id.*)

6. The true owner may maintain an action to recover the possession of his property, or its value, against a person who had purchased it in good faith from the wrongdoer, and had sold it in good faith, and without notice of the owner's rights, before the commencement of the action. (*Id.*)

7. The remedy provided by the Code to recover the possession of personal property, is applicable to every case in which the action of replevin, as given by the Revised Statutes, would formerly lie. (*Id.*)

8. The action of replevin in the *detinet*, is a substitute for the old action of *detinue*, and a remedy concurrent with *trover*. (*Id.*)

9. Under the Code, the action to recover the possession of personal property may be maintained, notwithstanding the defendant had wrongfully parted with its possession before the suit was commenced. (*Id.*)

10. And the purchaser of goods from a person having no title nor right to sell, acts wrongfully in selling the same property, though he make the sale in good faith, and in ignorance of the owner's rights. (*Id.*)

11. He has no title to the property, and cannot rightfully deliver it to any person other than its owner. (*Id.*)

12. The owner of a chattel and a vendee who receives possession upon condition that no title shall pass till payment, do not hold the relation of bailor and bailee simply; and the payment by a trespasser of a judgment recovered against him by the vendee, for damages for taking and converting the chattel, does not bar or affect a second action by the vendor for its value, when his right to possession reverts by non-payment of the price. (*Hastbrouck* agt. *Lounsbury*, 26 N. Y. R. 598.)

13. Possession under a general, or even a gratuitous bailment, is sufficient evidence of title to enable the bailee to maintain *trover* against a stranger who

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- intermeddles with the property. (*Bowen* agt. *Farmer*, 40 Barb. 383.)
14. The defendant, a jeweller, received from A. and wife, a set of diamond ear-rings and pin, supposing they were the owners, and as their agent and for their accommodation, he negotiated a sale of them to R. and B. for \$200. He received the proceeds of sale and paid the same over to A, in ignorance of the plaintiff's title, and without any charge for services: *Held*, that he was liable, in an action of trover, to the true owner, for the value of the property. (*Dudley* agt. *Hawley*, 40 Barb. 397.)
 15. Mere possession of goods will not give to the vendee of the possessor a title thereto, as against the true owner, even though such vendee be a bona fide purchaser, without notice of the rights of the owner. (*Linnen* agt. *Cruger*, 40 Barb. 633.)
 16. Where the defendant never had any possession of or control over promissory notes claimed by the plaintiff, except as the agent of his wife, who was entitled to hold them: *Held*, that his refusal to deliver them, on demand, could not constitute or be evidence of a conversion. (*Hurst* agt. *Kane*, 40 Barb. 639.)
 17. *Held*, also, that the omission or neglect of the defendant to perform a promise made to the plaintiff to procure promissory notes from those who rightfully held them, and deliver them to the plaintiff, did not constitute a conversion, where it appeared that the defendant never had the notes in his possession or control, and was unable in his individual capacity to obtain the possession and control thereof. (*Id.*)
 18. M. & C. being indebted to W., sold him a bill of goods, the price of which was not applied by receipt or otherwise to the debt, nor was there any proof of an agreement, that it should be so applied, but on the contrary it appeared from the bill of parcels that the purchaser was to give a note at ten months, payable to his own order: *Held*, that there was no payment of a part of the purchase money which would take the case out of the statute of frauds. (*Wyllis* agt. *Kelly*, 41 Barb. 594.)
 19. An agreement was made by M. & C. to sell a lot of goods in store to W.; a record of the sale was made on M. & C.'s book of original entries; a bill made out and delivered or sent to W.; the goods were set out by themselves on one side of the store, and an account taken of them; and W. consigned them to D. for sale on his account. *Held*, that there was sufficient evidence of delivery and acceptance to go to the jury, and that the question of delivery should have been submitted to them. (*Id.*)
- See EXECUTORS AND ADMINISTRATORS, 13, 14, 15, 16.
- ### PRINCIPAL AND AGENT.
1. The commissioners of emigration are not responsible for the carelessness, negligence, misfeasances, or positive wrongs of their agents or employees. (*Murphy* agt. *Commissioners of Emigration*, ante 41.)
 2. Where the principals employ an agent to purchase rye and barley for them on commission for cash, without limitation as to the time of the agency, or the quantity of grain to be purchased, and the agent continues to purchase of different farmers, and to ship to his principals, and to pay out to the vendors the money for such purchases as fast as received from the principals—the vendors knowing that the agent purchases for others, until a certain day when the principals revoke the agency, and agree to take the amount of grain which the agent has then purchased, which he estimates at a certain amount; the principals are liable to the several vendors who have not received their pay, for all the purchases made by the agent prior to the revocation of the agency; although the principals have paid the agent for all the grain they have received, and which they agreed to take when the agency was revoked. (*Rumery* agt. *Syracuse Distillery Co.* ante 111.)
 3. The agent is the agent of the principals to pay as well as to purchase. But such contracts only for purchases made by the agent, prior to the revocation of his agency, as did not come within the statute of frauds, by a part delivery, or part payment, &c., could be considered binding upon the principals. (*Id.*)
 4. In this case, the general facts were found as in *Rumery's case* (ante p. 111), and specially, that no part of the plaintiff's barley was delivered, and no part of the money paid until after

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the day that the agency of defendants' agent had ceased. (*Eschbaugh agt. Syracuse Distillery Co. ante 125.*)

5. Although the execution of a sealed instrument by an agent who has only a parol authority, is not good in general, and will not sustain an action against the principal, yet admissions contained in it are competent evidence against the principal. As, in an action for use and occupation of demised premises, the rent reserved in a sealed lease which was executed by defendant's agent, but is void for want of sealed authority to execute it, furnishes, as against the defendant, the measure of damages. (*Morrell agt. Cawley, 17 Abb. 76.*)
 6. The admission of an agent may be evidence against the principal, where the agent has general authority to transact the business of the principal, and indorse notes in his name, and states, on application to him before the note matures, that the note purporting to be indorsed by the agent, was so indorsed. (*Rothschild agt. Schubert, 8 Bosw. 289.*)
 7. Where a principal authorized an agent to draw and negotiate commercial paper for his use, and by a course of dealing in the recognition of such paper, drawn for legitimate purposes, had accredited drafts having nothing on their face to discriminate them from such as the agent had the right to issue, he is responsible to a purchaser for value and without notice, though the paper was issued fraudulently for the accommodation of a third party. (*Exchange Bank agt. Monteath, 26 N. Y. R. 505.*)
 8. The doctrine of *Aymar v. North River Bank* (2 Hill, 263), reaffirmed for the fourth or fifth time, notwithstanding the known reversal of the judgment in that case by the late court for the correction of errors—the reversal remaining unreported, except by such posthumous remembrances as the present. (*Id.*)
 9. B, as the agent of the defendant, was sent by them to the plaintiff, with a written order for a load of rye, nothing being said in the order, as to the price, and B having no authority to make a contract. The plaintiff informed B that his price for the rye was seventy-five cents per bushel, and that he would let the defendants have it at that price; and he directed B to inform the defendant what the price was. This B omitted to do, but took away a load of rye, and on returning for another load falsely stated to the plaintiff that he had told the defendants the price, and they did not object to it; whereupon he obtained another load. The market price for rye, at that time, was only fifty cents per bushel; Held, that the plaintiff was entitled to recover the sum named by him to B as his price for the grain. (*Booth agt. Bierce, 40 Barb. 114.*)
 10. Held, also, that there being an apparent bargain and sale at the vendor's price, which was entered into, on his part, in good faith, and which he had a right to rely upon as a valid agreement on the part of the purchaser, if either party must suffer from the misunderstanding, it should be the one who employed the agent by whom the fraud, which occasioned the injury, was practiced. (*Id.*)
 11. Acquiescence by a principal, in the wrongful acts of his agents to amount to a ratification, must have been continued for some length of time, and the principal must have been cognizant of his rights. (*Brass agt. Worth, 40 Barb. 648.*)
 12. In order to make the ratification of an unauthorized act of an agent binding, it must be made with a full knowledge of the facts affecting the rights of the principal. (*Id.*)
 13. An agent, who is commissioned by his principal to purchase a certain specific amount of property, is a special agent, and can no more purchase a smaller than a larger quantity of what he is commissioned to purchase. (*Olyphant agt. McNair, 41 Barb. 446.*)
 14. Though there may be cases where the purchaser of a smaller quantity than that ordered would be deemed valid, as an execution of the authority *pro tanto*, yet such cases can only occur when an express or implied discretion was committed to the agent in the exercise of his authority. (*Id.*)
- See HUSBAND AND WIFE, 4.
See CONTRACT, 18, 19.
See ATTORNEYS, 13.

PUBLIC OFFICERS.

1. Where a town clerk declares publicly his intention of removing from the town and county, and consults with the justices of the peace in the town

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as to the appointment by them of his successor, and does actually thereafter leave the town, and his successor is appointed, who qualifies, and takes possession of such books and papers belonging to the office as he can find, the latter will be considered duly appointed town clerk, and entitled, on application to the court, to have delivered to him the books and papers of the office, notwithstanding the former clerk swears on such application, that he was and still is a resident of the town, and expected to return there. (*Matter of Bayley, ante 151.*)

2. Where money is exacted by and paid to public officers, under a claim of right for their services as such, if they be not entitled thereto, it is illegally exacted and may be recovered back. Persons appointed by the comptroller of the state to make preliminary examination of the assets of the plaintiffs, required by an act of the legislature (L. 1853, ch. 466, § 10), relative to the incorporation of fire insurance companies, are public officers within this rule. (*American Exchange Fire Ins. Co. agt. Britton, 8 Bos. 148.*)

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 14.

PUBLICATION OF SUMMONS.

1. In actions commenced by publication of summons, jurisdiction therein is strictly statutory, and can be acquired only in the mode prescribed by the statute. The fact of the defendant's non-residence is not sufficient to authorize an order for publication of the summons; it must also appear that effort, without avail, has been made to find the defendant within the state. Nor can such an order be sustained subsequently by proof that the defendant was not, in fact, within the state. The validity of an order of publication of summons must be judged solely upon the sufficiency of the affidavits upon which it was granted. (*Wortman agt. Wortman, 17 Abb. 66.*)
2. Where, upon an application for an order that the service of a summons may be made by publication, pursuant to the provisions of section 135 of the Code, the applicant must not only show that the case falls within some one of the five subdivisions of that section, but he must also establish the jurisdictional fact that the person on whom the service of the summons is to be made cannot, after due diligence be found within the state. The circumstance that such person is a non-resident is of no importance, except as it tends to establish the fact that he is not within the state at the time the application is made. (*Peck agt. Cook, 41 Barb. 549.*)
3. If the affidavit upon which an order for publication is granted is insufficient, the plaintiff will not be aided by the fact that, after the order for publication was made, the summons and complaint were served upon the defendant, personally, out of this state. (*Id.*)

RAILROADS.

1. A railroad company are liable for injuries caused by the act of the driver of their car, in wrongfully ejecting a passenger from the platform, even though the act of the driver be forcible, malicious and willful, and not merely negligent. (*Meyer agt. Second Av. R.R. Co. 8 Bosw. 305.*)
2. In an action against a city railroad to recover damages where it appeared that the collision was occasioned by the plaintiff's unwisely and unnecessarily turning his horses so as to throw the rear part of his cart against the defendant's car, held, that a verdict for the plaintiff was against evidence. In cases of collision between a horse car upon a street railroad and an ordinary vehicle which can traverse all parts of the street, any presumption of negligence is against the driver of the latter. (*Snydam agt. Grand St. and Newtown R.R. Co. 17 Abb. 304, and 41 Barb. 375.*)
3. The act of the driver or brakeman of a street car in assisting passengers to get on board is in the course of his employment, and makes the principal liable for negligence in its performance. (*Drew agt. Sixth Av. R.R. Co. 26 N. Y. R. 49.*)
4. The passenger being a boy of eight years, it was not, as a matter of law, negligence in his parent to send him out without a protector. (*Id.*)
5. The boy being injured, the parent's damages are not confined to the loss of his services down to the trial, but include all such prospective loss as must necessarily follow from the injury. (*Id.*)

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6. Where a railroad corporation, attempting to organize under the general law, has filed papers having color of compliance with the statute, but so defective as to be incapable of supporting the incorporation as against The People, it may yet, as against a subscriber to its capital, be held a corporation *de facto*, upon proof of the feeblest user. (*Buffalo and Allegany R.R. Co. agt. Cary*, 26 N. Y. R. 75.)
 7. An incorporation thus established upon no other proof of user, prior to subscription, than the election of officers by the persons calling themselves directors; this, against the representative of a subscriber in June who died in September, and such other acts of user as were proved, were not fixed more definitely as to time than that they were *after* the election of officers, which preceded the subscription one week. (*Id.*)
 8. A common carrier is bound, absolutely and irrespective of negligence, to provide road-worthy vehicles. *Held*, accordingly, that a railroad corporation was liable for injuries to a passenger, caused by a crack in the iron axle of a car, although the defect could not have been discovered by any practicable mode of examination. (*Alden agt. N. Y. Central R.R. 26 N. Y. R. 102.*)
 9. When a railroad corporation has constructed and maintains proper fences and cattle guards, as required by statute, its absolute liability for damages to cattle upon its track ceases; and although guilty of negligence in keeping the cattle guards effective, it is not responsible to the owner of cattle who is himself chargeable with negligence in allowing them to get upon the track. (*Hance agt. Cayuga &c. R.R. Co. 26 N. Y. R. 428.*)
 10. So held, where the corporation was negligent in not removing snow which filled up the cattle guards so that they made no substantial impediment to the passage of cattle. The owner of cattle escaping from a yard on to the track under such circumstances is chargeable with negligence, and cannot recover for an injury, though guilty of no actual carelessness in suffering them to escape. (*Id.*)
 11. Otherwise, *it seems*, if the cattle, being lawfully driven along the highway, had made their way on to the track in consequence of the neglect of the railroad company in not clearing its cattle guards of snow: *Per Bacon, J.* (*Id.*)
 12. The penalty imposed by chapter 185 of 1857 upon a railroad corporation for exacting a greater rate of fare than is allowed by law, is incurred where its conductor illegally required five cents in addition to the legal fare because the passenger had no ticket. (*Chase agt. N. Y. Central R.R. Co. 26 N. Y. R. 523.*)
 13. Chapter 228 of 1857 allows the charge of five cents for not having a ticket only when the company has its ticket office, at the station where the passenger starts, open at the time of starting, though this be at midnight and the statute imposes no duty upon the corporation of keeping its ticket offices open after 9 P. M. (*Id.*)
 14. Where the board of directors of a railroad corporation, by resolution, directed that a claim held by the corporation should be transferred to certain persons specified, and that the "proper officers" should execute the requisite assignment; *it was held* that it was to be presumed, in the absence of proof to the contrary—at least in favor of third persons dealing with the company, that the president and secretary were the proper officers for that purpose. (*Carroll agt. Cone*, 40 Barb. 221.)
 15. The absence of all proof of knowledge by a person injured, of the structure for shifting cars from one track to another by a side movement, and the danger resulting to passengers therefrom, will exonerate him from the charge of having contributed to the accident by his own carelessness. (*Gordon agt. Grand St. and Newtown R.R. Co. 40 Barb. 546.*)
 16. Neither an entry into the cars, upon a railroad, nor the payment of the fare, is essential to create the relation of carrier and passenger. Being within the waiting room, waiting to take the cars, is as effectual to make one a passenger as if he were within the body of the car. (*Id.*)
- See BILLS OF EXCHANGE AND PROMISSORY NOTES, 12, 13.
- RECEIVERS.
1. Where a receiver of an insurance company brings an action as such, and pending the action he is removed and

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another person is duly appointed receiver in his place, it is proper and right to *substitute the successor* as plaintiff in the action. The *death afterwards*, of the *first receiver* does not abate the action, nor affect it in any respect. (*Sheldon agt. Adams, ante 179.*)

See SECURITY FOR COSTS, 2.

REFEREES AND REPORTS.

1. The code (§ 272,) requiring a referee to state the facts found by him and his conclusions of law separately, does not require any further findings upon the *facts* than such as *enter into and form the basis of the judgment* rendered by him. He is not required to negative in express terms any other facts. Facts not found are necessarily negatived by implication. (*Nelson agt. Ingersoll, ante 1.*)
2. Thus, if the defendant fails to establish his defence or counter claim, the referee, in finding for the plaintiff, negatives the defence or counter claim by *implication*. He is not required to find upon the facts of such defence or counter claim specially, or take any notice in his report of the issues raised thereby. (*Id.*)
3. A referee cannot be required or allowed to make any new findings, either of law or fact, after he has decided the cause and delivered his report. He can then only settle a case which will contain the proceedings had upon the trial, with the request to find upon matters of law and fact, with the *exceptions* taken to his decision after the report is made and delivered. If his finding upon the facts will not sustain his conclusions of law, his judgment based thereupon, with or without a case, upon the report itself, must be reversed. (*Id.*)
4. A judgment entered on a report of a referee, will not on appeal, upon a question of *evidence merely* be reversed, although from the evidence in the case, the referee might well have found the other way. (*Eschbaugh agt. Syracuse Distillery Co., ante 125.*)
5. *Referees* appointed under the statute by the county judge, for the purpose of hearing an appeal from the decision of commissioners of highways, in reference to laying out a highway, &c., possess all the powers that were formerly possessed by three judges of the late common pleas, under the provisions of Title I, Art. 4, Ch. 6, Part I of the Revised Statutes. (*People agt. Ferris, ante 193.*)
6. But such referees have no express powers given under the statute, and none incidental to those expressly given, which authorizes them to *open a case for a rehearing upon the merits*, after the testimony is closed and the case *finally submitted to them for their decision*. (*Id.*)
7. It seems, that where by *accident or mistake* a party interested has been deprived of any hearing, or of only a partial hearing, the referees have the power, upon due notice given, to *open case for rehearing* after it has been submitted. (*Id.*)
8. Where a referee makes two reports, both of which contain an award of judgment, a *special report* containing findings of fact and conclusions of law, and the other a *general report*, finding the same sum to be due by reason of the matters and things contained in the complaint: *Held*, that the general report did not dispose of such issues as a report of referees is required by the Code to do, and must be disregarded. (*Niles agt. Battershall, ante 381.*)
9. Where a referee's report does not, in terms, specify a finding upon each of the material allegations in the complaint, but finds that there is "due to the plaintiff by the defendants," a specified sum, for which judgment is ordered, the report, on appeal from the judgment, will not be disturbed where there is nothing in the evidence or case repugnant to the inference that the referee did find all the allegations of fact essential to a recovery by the plaintiff. (*Richardson agt. Dugas, 8 Bos. 207.*)
10. A report of a referee will be set aside and a new trial granted, in an action to recover a sum alleged to be due for work and labor done by the plaintiffs for the defendants, at their request, where the referee finds for the plaintiffs the sum claimed, and his report contains a statement of the matters of fact found by him, and many of such matters are not embraced within the terms of the issue, and the report does not in terms pass upon the substance of the issue made by the pleadings, and the evidence in the case would not warrant a finding of such issue, in its substance, in the plaintiff's favor, and many of the ma-

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terial facts specified as found, are contrary to evidence. (*Sackett* agt. *N. Y. & N. H. Railroad Co.* 8 Bosw. 328.)

11. Every intendment is to be made, of which the evidence will admit, to sustain the report and supply the necessary facts to justify it on appeal from a judgment on the report. A referee has power, upon the trial, to permit an allegation in the complaint that the assignment to the plaintiff of a bond and mortgage in suit was in writing and for a certain sum, to be amended by alleging that the assignment was by parol, and as security for an uncertain sum. (*Hoyt* agt. *Hoyt*. 8 Bos. 511.)

12. A finding of a referee, as a conclusion of fact, that an assignment was delivered in settlement of a previous demand, and as a conclusion of law, that it was not received in extinguishment of an equal amount of indebtedness, may be construed to mean that it was received only as security. (*Id.*)

13. The objection that a referee's report does not state the facts found and his conclusions of law separately, cannot be raised on an appeal from the judgment entered on the report; but only by a special term motion to correct the report. (*Platt* agt. *Thorn*, 8 Bos. 574.)

14. The court, on appeal, will not interfere with the referee's rejection of part of the plaintiff's demand, and his allowance of a counter-claim made by the defendant, where these were apparently the result of his determination of facts, and are sustained by some evidence, and not against such weight of evidence as to justify setting aside the report on that ground. (*Id.*)

15. In an action on an insurance policy, where the defense involves a charge of fraud on the part of the insured, a compulsory reference of the issues cannot be ordered. (*McLean* agt. *East River Ins. Co.*, 8 Bos. 700.)

16. The provisions of the Code (§ 273), requiring referees to report within sixty days, do not apply to a case of reference under the approval of the surrogate, where an executor or administrator doubts the justice of the claim. Only those claims against the estate of a deceased person are referable under the statute (2 R. S. 90), which accrued during his life, or would

have accrued against him if he had lived. (*Goddling* agt. *Porter*, 17 Abb. 347.)

17. Upon a motion to confirm the report of a referee on a claim against the estate of a deceased person, referred under the statute, the moving papers show plainly a claim of a nature not referable, the defendant may oppose the motion to confirm the report of the referee without making a case. On denying the motion to confirm, costs will not be given, for the reference was by the defendant's consent. (*Id.*)

See DIVORCE, 9.

See APPEAL, 14.

RIOT ACT.

1. The act of the legislature of 1855, commonly called the riot act, provides that "Whenever any building or other real or personal property shall be destroyed or injured, in consequence of any mob or riot, the county or city in which such property was situated shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for the damages sustained by reason thereof." And then provides that actions may be brought and conducted in the same manner that other actions may be prosecuted by law, and directs that "Whenever any final judgment shall be recovered against any such city or county, in any such action, the treasurer of such city or county shall, upon the production and filing in his office of a certified copy of the judgment roll, pay the amount of such judgment to the party or parties entitled thereto, and charge the amount thus paid to said city or county." (*Davidson* agt. *Mayer &c.*, of *New York*, ante 342.)

2. Held, that this act does not conflict with any provisions of the constitution of this state, and especially that which declares that no person shall be deprived of life, liberty or property, without due process of law. (*Id.*)

3. For the reasons: 1st. That the act does not allow judgments recovered under it to be collected in any other manner than is prescribed by the act, and such judgments create no lien upon property; 2d. That such judgments have not the attributes of ordinary judgments, and that none of the corporate property of the city can be seized or made liable for their pay-

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- ment: 3d. The burden of paying them falls upon the *tax payers* of the city, and not upon the city—the act being in effect a mere mode of *assessing* the damages occasioned by disorderly and riotous persons, unlawfully assembled, with a provision for their payment by the treasurer of the city or county, enabling the city or county, as a municipal corporate body, representing the people within its limits, to contest the amount of the recovery. (*Id.*)
4. The power of the legislature to impose the burden of *taxation* upon the citizens, for *local* as well as governmental purposes, cannot at this day be questioned. (*Id.*)
5. Neither is the effect of this act to *impair the obligation of contract*, and thus violate the provision of the constitution of the United States. (*Id.*)
6. For if the act does not deprive the city of any of its *property*, and the *power to tax* is a constitutional power, it necessarily follows that no *vested right* of the city can be disturbed, nor can the obligation of any contract be impaired. (*Id.*)
7. The corporation of the city of New York is a *public corporation*. But the legislature can, at pleasure, change or suspend the political or governmental powers of the city, and may alter or amend any of the provisions of its charter, *so long as there is no deprivation of or interference with her vested rights of property*. (*Id.*)
- SALE.
1. An ordinary *invoice or bill of sale*, which states in terms that the purchaser has bought of the vendors certain articles or goods at certain prices, and which accompanies the delivery of the goods to the purchaser, cannot be contradicted by *parol evidence* showing that the invoice was delivered in pursuance of a previous *parol agreement* between the parties, that the goods were to be delivered to the purchaser as the agent of the vendors, and to be sold by him *on commission*; and that the title of the goods was to remain in the vendors, with a right to retake them at any time on non-payment of the sales as per agreement. The property held liable to seizure and sale on execution against the purchaser in possession. (*Bonesteel* agt. *Flack*, ante 310.)
2. And *if seems* that the possession of the property in this case — liquors and wines to be sold at retail—being inconsistent with the continued ownership of the vendors, the transaction will be presumed fraudulent as against purchasers and creditors. (*Id.*)
3. A claim for damages for the breach of a *parol contract* — to sell *standing trees*, cannot be sustained. The contract not being in writing is void. (*Lawrence* agt. *Smith*, ante 327.)
4. Where such contracts are enforced specifically in equity, it is in part owing to the circumstance that no recovery in damages for the breach of them can be had. Courts of equity do not remunerate parties by damages arising out of the breach of agreements which are void under the statute of frauds. (*Id.*)
5. Therefore, the promise of the plaintiff who is alleged to have violated such a contract, to pay a certain sum as damages for such alleged violation, is without consideration, and cannot be enforced by the defendants as a recoupment; although the action is brought upon the defendants' promissory note, given for part of the purchase price of the property sold under the contract. (*Id.*)
6. Unless the bill of sale or conveyance of a vessel be recorded in the office of the collector of customs where such vessel is registered or enrolled, the conveyance is void as against an execution creditor of the vendor, unless such creditor, at the time of the levying his execution, had actual notice of such bill of sale or conveyance. (*Parker Mills* agt. *Jacot*, 8 Bos. 161.)
7. A sale of land on a judgment extinguishes the lien of the judgment and the right to redeem under it. In like manner, any claim upon surplus moneys arising upon the foreclosure of a prior mortgage is extinguished by such a sale. A judgment debtor whose land has been sold on execution, subject to an antecedent mortgage, and whose equity of redemption has been subsequently foreclosed and sold, has no right to redeem under the statute, as a judgment debtor whose real property has been sold on execution. (*Husted* agt. *Dakin*, 17 Abb. 137.)
8. To sell together, on execution, land consisting of distinct parcels, is an irregularity merely. In selling property upon execution, the sheriff acts by

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virtue of a statutory authority which must be strictly pursued. (*Id.*)

9. A sale of stocks at the board of brokers is not to be deemed a public sale, but is essentially a private sale; and a sale of collaterals held by the pledgees thus made, without notice, is a clear violation of the duty and obligation they owe the pledgor. (*Brass* agt. *Worth*, 40 *Barb.* 649.)

10. Where the *gravamen* of the complaint was fraud upon the sale of goods, by sample, through a broker; *Held*, that parol evidence of the statement of the vendors to the broker, previous to the sale, respecting the quality of the bulk of the article as compared with the sample, was admissible; notwithstanding there was a memorandum of the sale, in writing, signed by the broker, which was silent as to the quality of the articles sold. (*Koop* agt. *Hendy*, 41 *Barb.* 454.)

See ATTORNEYS, 1, 2, 3, 4, 5, 6, 7, 8.

See PARTITION, 1, 2, 3, 4.

See ASSIGNEE, 3, 4, 5.

See EXECUTORS AND ADMINISTRATORS, 8, 9, 10.

See CONTRACT, 12, 13, 14, 15, 16, 17, 26, 27.

See FRAUDULENT TRANSFER OF PROPERTY.

See FRAUDULENT REPRESENTATIONS.

See SURREGATE, 67.

See JOINT-DEBTORS, 7, 8.

SECURITY FOR COSTS.

1. A motion for security for costs, made by the defendant three days after he first ascertained that plaintiff was a non-resident, is made in season, though after trial. In an action brought by a non-resident to recover specific personal property, the giving of an undertaking under § 209 of the Code, which is not under seal, and is not shown to be for the amount of \$250, or upwards, does not supersede the liability of the plaintiff to be required to give security for costs on account of his being a non-resident. (*Boucher* agt. *Pia*, 8 *Bow.* 691.)
2. An order of the court granted *ex parte*, giving a receiver leave to sue, is not a bar to a motion to require such

receiver to file security for costs. (*Bolles* agt. *Duff*, 17 *Abb.* 448.)

See APPEAL, 23.

SERVICE.

1. In this case, the *service of motion papers* by the defendant's attorney to set aside an attachment and an order for publication, made upon the plaintiff's attorney some four years after the entry of judgment in the action, was held sufficient. (*Drury* agt. *Bassell*, ante 130.)
2. The extension of the time to file and serve exceptions, or to serve a case with exceptions, does not also extend the time to serve a notice of appeal. Nor does the extension of the time to appeal, *per se* extend the time to file and serve exceptions, or to serve a case with exceptions. (*This is adverse to Sherman* agt. *Wells*, 14 *How.* 522, and *Jackson* agt. *Fassitt*, 33 *Barb.* 645. (*Salts* agt. *Butler*, ante 133.)
3. The court has no power to extend the time to appeal from the special to the general term, after the statute time to appeal has expired. (*The several reported cases on each side of this question examined.*) (*Id.*)
4. Process for the commencement of an action against a convict in the state prison, may be served upon him in the prison. Although his right to sue is suspended, he may still be sued, and the suit prosecuted to judgment. The conviction, and sentence to the state prison, of a party defendant, pending the action against him does not abate the action. (*Davis* agt. *Duffie*, 8 *Bow.* 617.)

See SUPPLEMENTARY PROCEEDINGS, 5.

See PUBLICATION OF SUMMONS, 1, 2, 3.

See WAIVER, 5.

See SUMMONS, 7.

SHERIFF.

1. Where in an action for the delivery of personal property, the defendant has been arrested under an order pursuant to subdivision 3 of section 179 of the Code, and has given the undertaking with sureties, provided by section 211, "for the delivery of the property to plaintiff, &c.," and been thereon liberated from arrest, and the process

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returned, but his sureties on being duly excepted to, fail to justify: *Held*, that in such case, the sheriff himself, by such omission becomes bail. (*McKenzie* agt. *Smith*, ante 20.)

2. *Held* also, that the liability of the sheriff as such bail, is of the same nature and extent as that of the original bail, viz: "for the delivery of the property to the plaintiff, and the payment of a sum, &c.," (§ 211,) and not "that he shall at all times render himself amenable to the process of the court, &c." And after judgment for the plaintiff in the original action, and execution duly issued and returned unsatisfied, an action may be maintained against the sheriff to collect the said judgment. And where in such case, the sureties neglecting to justify, on exception, did within the time for justifying, deliver up their principal to the sheriff, who again took him into custody, and liberated him on his executing a bond for the jail limits, certifying on the original undertaking that he had been surrendered by his bail: *Held*, that such surrender is not valid, and cannot exonerate from liability the bail or the sheriff, who had become bail in their stead. (*Id.*)

3. The only mode in which the sheriff could exonerate himself, would be by putting in and justifying bail adapted to the action, viz: of the kind provided by § 211. (*Id.*)

4. Where a sheriff has seized property upon an attachment, the court will not, unless he is irresponsible, order him to pay the proceeds into court, at the instance of one of the defendants, who had a prior execution against the other, under which the sheriff had levied on the same property before the attachment. (*Dodge* agt. *Porter*, 8 Bosw. 696.)

5. A party who directs, and the officer who makes an oppressive levy is responsible for the unlawful act. As regards the officer, the rule is that where a ministerial officer does anything contrary to the duty of his office, and damage thereby accrues, an action lies. Although there be no actual corruption, or intentional fraud on the part of the sheriff, yet if he abuse his trust he is answerable to the law. (*Cantine* agt. *Clark*, 41 Barb. 629.)

See *SALK*, 7, 8.

See *LEVY*.

See *ASSIGNMENT FOR THE BENEFIT OF CREDITORS*, 18, 19.

See *ATTACHMENT*, 2, 4.

SLANDER.

1. An action lies for slander of the plaintiff's title to personal property. (*Liles* agt. *McKinstry*, 41 Barb. 186.)

2. To maintain such an action the plaintiff must establish, 1. That the words were false. 2. That they caused an injury to him in reference to his title to his property. 3. That they were uttered maliciously, and in order to injure the plaintiff. (*Id.*)

3. The plaintiff and defendant made a parol agreement, by which the former hired the farm of the latter, for one year from the first of April, 1861, with the privilege of sowing the farm to rye in the fall of 1861, and reaping the crop; the plaintiff to have the use of the barn and press, on the farm to press the straw, &c. The plaintiff sowed rye on the farm in the fall of 1861, with the assent and assistance of the defendant. *Held*, that the lease originally made was only legal and valid for one year from its commencement; but that the defendant, by assenting to and assisting in the sowing of the rye in the fall, sanctioned the stipulation in the lease for the sowing and reaping of the crop, and virtually made a new agreement with the plaintiff, conceding the use of the farm for such further period as was requisite. (*Id.*)

4. *Held*, also, that such new agreement was valid, and founded on a sufficient consideration, and gave to the plaintiff a good title to the rye, and the right to maintain an action for slander of his title. (*Id.*)

SPECIFIC PERFORMANCE.

1. Although an oral agreement to exchange one piece of real estate for another is void by the statute of frauds, yet if the parties have executed such an agreement, in part, and the plaintiff has fully performed to the extent of his agreement, and the defendant has accepted and retained all the advantages to be derived from such performance, it will not after that, lie with him to refuse performance on his part and urge the invalidity of the agreement. (*Bennett* agt. *Abrams*, 41 Barb. 619.)

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2. Where possession has been taken by both parties under an oral agreement for the exchange of land, and one of them has fully performed on his part, and the fairness of the agreement is not assailed, he may maintain a suit in equity to enforce a specific performance of it by the other party. (*Id.*)
3. An executory contract for the exchange of lands is not merged in the deeds of conveyance. And if one of the parties to such a contract agrees to satisfy and discharge an existing mortgage upon his land, in addition to the execution and delivery of a deed, these are separate and distinct acts, and performance as to one will neither extinguish nor discharge the party's obligation in respect to the other. (*Id.*)
3. A party who is entitled to a specific performance of an agreement to release his land from the lien of a mortgage may maintain a suit in equity for that purpose, notwithstanding he has before the filing of his bill, conveyed away the land by deed with warranty. (*Id.*)
5. As a general rule, to entitle a party to ask the interposition of a court of equity to enforce the specific performance of a contract, the contract must be supported by what courts of equity deem a meritorious consideration. If the inadequacy of consideration be so great as to render the bargain hard or unconscionable, the court may refuse its aid to enforce the contract and leave the parties to contest their rights at law. (*Williston* agt. *Williston*, 41 Barb. 636.)
6. In equity time is not, ordinarily, of the essence of a contract respecting real estate. It may, under certain circumstances, be made, or become so; but the general rule is that if a party has not been guilty of a gross neglect, if his delay can be reasonably explained, and is consistent with good faith, and time has not been made material by the agreement of the parties, a court of equity will afford relief notwithstanding the delay. It is always sufficient for a party to show that his losses have arisen from a reasonable cause, or has been acquiesced in by the other party. (*Id.*)
7. A parol agreement for the conveyance of land will, if partly executed by the party seeking relief, be specifically enforced. Where a purchaser takes possession of lands under a parol agree-

ment of the vendor to convey, a court of equity will decree a specific performance, especially if improvements have been made by the vendee on the faith of the agreement. (*Id.*)

STAMPS.

1. There is no authority for requiring a copy of a summons to indicate that the original summons was duly stamped with a United States revenue stamp. The copy is sufficient where there is no indication of such stamp contained on it. (*This reverses S. C. at special term, 26 How. Pr. R. 383.*) (*Watson* agt. *Morton*, ante 294.)
2. Although an original process stamp may be necessary on a notice on appeal from a justice's court to the court of common pleas, yet notwithstanding section 96 of the act of congress, July 1, 1862, which provides that every instrument, document or paper, not stamped according to schedule B, should be invalid and of no effect, an appeal will not be absolutely void where such a stamp has not been preliminarily affixed to it, provided the court considers that the appeal was taken in good faith. In such a case, where it appears that the appellant had through mistake omitted to do some act necessary to perfect the appeal, they will, under section 327 of the Code, allow the appellant to perfect his appeal by affixing the stamp on it even in open court. (*Whitley* agt. *Leeds*, ante 378.)

STATUTE OF LIMITATIONS.

1. In an action upon promissory notes made by the defendant, while a resident of New Jersey, more than six years prior to the commencement of the action, he cannot set up the statute of limitations as a defence; although for the last seven years he came from his residence in New Jersey every morning except Sundays, openly and publicly in the city of New York, where he did business during the business hours of the day, as a clerk or merchant, and returned to his residence every evening. (*McCord* agt. *Woodhull*, ante 64.)
2. An action to reform a contract or instrument in writing for the sale of lands, on the grounds of mistake, accident or inadvertence, is barred by the ten years statute of limitations from the time the cause of action accrued; and not, as in cases of fraud,

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where the statute runs *six years* from the time the *fraud is discovered*. Before the Code, the statute of limitations applicable to the grounds of fraud, were equally applicable to these of mistakes and accidents. (*Oakes* agt. *Howell*, ante 145.)

3. The statute of limitations does not begin to run against the right of a remainderman to redeem real estate from the mortgagees in possession under the term or until the determination of the precedent estate. (*Fogal* agt. *Pirro*, 17 *Abb.* 113.)

4. In cases arising before, as well as since the Code, the defence of the statute of limitations can be interposed only by answer. In pleading the statute of limitations in an action brought to obtain redemption of mortgaged premises, the essential features of the defence are: possession for over ten years without any payment on account of the mortgage, or any acknowledgment of the relation of mortgagor and mortgagee, or any payment of rents and profits, or accounting for them. But an answer averring a possession in the defendant and those under whom he claims for twenty years, adverse and hostile to the plaintiffs, and under a vested title in the defendant, or those under whom he is entitled, is sufficient. (*Id.*)

5. An acknowledgment, to take a case out of the operation of the statute of limitations, need not express any intention to pay the debt. An intention to pay is to be presumed. If the debtor acknowledges the existence of the debt, in writing, the provisions of the law are met and the statute of limitations will not attach. (*McNemes* agt. *Tenny*, 41 *Barb.* 495.)

6. Section 110 of the Code of Procedure, which requires that a promise to take a case out of the operation of the statute of limitations, shall be in writing, is not applicable to cases where the right of action had accrued previous to the adoption of the Code: *Held*, therefore, that parol promises made in 1851 and 1856, to pay a debt which existed and was in full force at the time the Code took effect, in 1848, were sufficient to take the case out of the statute of limitations, the case coming within the exception of section 73 of the Code. (*Coe* agt. *Mason*, 41 *Barb.* 612.)

See *DIVORCE*, 7.

STAY OF PROCEEDINGS.

1. In an action of *trover* for the conversion of personal property, by an assignee of the claim, the plaintiff's proceedings will be *stayed on motion*, until payment of a prior judgment of non-suit for costs, obtained by the defendant against the plaintiff's assignor for the same cause of action. (*Richardson* agt. *White*, ante 155.)

2. The rule is the same in personal actions as in actions to recover real property. (*Id.*)

See *HUSBAND AND WIFE*, 1, 2.

See *APPEAL*, 21, 31, 32.

SUMMONS.

1. Where it appears in the return of a justice of the peace that he issued a summons, giving the names of the plaintiff and defendant therein, and also the time and place of its return, the court will presume that the summons was in the proper form; and an objection that it does not appear that it was directed to any constable of the county of, (the proper county) is not tenable. If there is any informality in the process, it lays with the party objecting to make it appear. (*Potter* agt. *Whittaker*, ante 10.)

2. An objection that it does not appear that the person serving the summons was a constable of the county of, (proper county) cannot prevail; where it appears from the justice's return that he issued a summons, directed to any constable of the county of, (the proper county) which was returned with a return thereon indorsed, that the same was personally served by W. Carpenter, constable. Such a return is to the effect that the summons was served by a constable of the proper county, and also that it was served within the county. (*Id.*)

3. Where a justice's return shows, by fair intendment, that all the jurisdictional steps were taken necessary to a valid judgment before him, that he issued a summons, which was served by a constable personally on the defendant, enough is stated to raise the presumption of regularity as to the form of the summons and its due service on the defendant. If any error occurred, it is the duty of the party alleging it to make it appear to the court on appeal, as no presumption of error will be indulged against the regularity of the judgment. (*Id.*)

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4. A *general appearance* of a defendant cures an *irregularity in the summons*; e. g. an indorsement upon it referring to the statute under which the action is claimed to have been brought. And the effect of the appearance is the same, although the defendant did not know of the irregularity when he appeared. (*Sprague* agt. *Evola*, ante 51.)

5. In an action under the statute (§ 7, Art. 1, Tit. 5, ch. 8, Part 3, of the *Revised Statutes*), for *willful trespass on land*, it is not necessary to indorse the summons with a reference to that statute, because the statute does not give the action, it merely creates a *forfeiture of treble damages*, where the testimony warrants such damages. (*Id.*)

6. There is no authority for requiring a *copy of a summons* to indicate that the original summons was duly stamped with a United States revenue stamp. The copy is sufficient where there is no indication of such stamp contained on it. (*This reverses S. C. at special term, 26 How. Pr. R. 383.*) (*Watson* agt. *Morton*, ante 294.)

7. A defendant, residing in Canada, who was inveigled into this state by a trick, for the purpose of effecting a service of the summons upon him, the service of the summons and all proceedings dependent thereon, were set aside, and a warrant of attachment vacated. (*Metcalf* agt. *Clark*, 41 Barb. 45.)

See JUSTICES' COURTS, 9, 10, 25, 26, 27.

See PUBLICATION OF SUMMONS, 1, 2, 3.

SUPPLEMENTARY PROCEEDINGS.

1. In supplementary proceedings against a person having property of a judgment debtor, it is discretionary with the judge who conducts the proceedings whether notice of the proceedings shall be given to the judgment debtor. (*Ward* agt. *Beebe*, 17 Abb. 1.)

2. The commencement of supplementary proceedings against judgment debtors alone, and the appointment of a receiver therein, creates no lien upon assets which the debtors have previously assigned. (*Field* agt. *Sands*, 8 Bos. 685.)

3. A judgment in a creditor's suit against a debtor and his assignee declaring the assignment void, is not evidence

that it is void in supplementary proceedings by another creditor against the same debtor, to which the assignee is not a party. (*Id.*)

4. The payment of the principal sum due upon a judgment, is no bar to supplementary proceedings to collect the interest. Every judgment bears interest from the time of perfecting it. (*Johnson* agt. *Tuttle*, 17 Abb. 315.)

5. Where a judgment debtor, who had been served in supplementary proceedings with an order for his appearance, moved to vacate the order, which motion was denied, with a direction that the debtor appear on a subsequent day: *Held*, that the second order need not be personally served. (*Id.*)

See APPRAI, 16.

SURETIES.

1. Where in an action for the *delivery of personal property*, the defendant has been arrested under an order pursuant to subdivision 3 of section 179 of the Code, and has given the undertaking with sureties, provided by section 211, "for the delivery of the property to plaintiff, &c.," and been thereon liberated from arrest, and the process returned, but his sureties on being duly excoepcted, fail to justify: *Held*, that in such case, the sheriff himself, by such omission becomes bail. (*McKenzie* agt. *Smith*, ante 20.)

2. *Held* also, that the liability of the sheriff as such bail, is of the same nature and extent as that of the original bail, viz: "for the delivery of the property to plaintiff, and the payment of a sum, &c." (§ 211,) and not "that he shall at all times render himself amenable to the process of the court, &c." And after judgment for the plaintiff in the original action, and execution duly issued and returned unsatisfied, an action may be maintained against the sheriff to collect the said judgment. And where in such case, the sureties neglecting to justify, on exception, did within the time for justifying, deliver up their principal to the sheriff, who again took him into custody, and liberated him on his executing a bond for the jail limits, certifying on the original undertaking that he had been surrendered by his bail: *Held*, that such surrender is not valid, and cannot exonerate from liability the bail or the

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- sheriff, who had become bail in their stead. (*Id.*)
3. The only mode in which the sheriff could exonerate himself, would be by putting in and justifying bail *adapted to the action*, viz: of the kind provided by § 511. (*Id.*)
 4. The act (1 R. S., p. 400, § 13), requiring a county treasurer to issue a warrant against a delinquent town collector in twenty days is directory merely; and the issue of such warrant after the expiration of that time is valid as the foundation of an action against the collector's sureties. (*Looney agt. Hughes*, 26 N. Y. R. 514.)
 5. It seems that the issue and return of such a warrant by the treasurer is a condition precedent to the maintaining a suit by the supervisor against the collector or his sureties on his official bond. (*Id.*)
 6. It furnishes no defence to the sureties of a collector that, if the warrant against their principal had been issued within the time prescribed by law, the amount due might have been collected of him. The provision is for the benefit of the public, and forms no part of the contract of the sureties. (*Id.*)
 7. A promissory note, payable with interest, generally, and executed by a surety, was, after the execution thereof, by agreement between the principal and the payee, but without the knowledge or assent of the surety, altered by an addition thereto, making the interest payable semi-annually; *Held*, that this was a material alteration, which rendered the instrument void as against the surety. (*Dewey agt. Reed*, 40 Barb. 16.)
 8. Where an undertaking was given on appeal to the general term, on demurrer, conditioned that the appellants would pay all costs and damages which might be awarded against them on said appeal, not exceeding \$250, and also the judgment appealed from, *if the same should be affirmed*: *Held*, that there was no liability, on the part of the sureties, until there was an absolute affirmation of the judgment. (*Poppenhausen agt. Sealey*, 41 Barb. 450.)
 9. The respondent must have the right to enter and collect a *judgment of affirmation*, before he can proceed against the sureties in such an undertaking. (*Id.*)
 10. A mere order of the general term, affirming the judgment appealed from, except that the appellants have leave to answer the complaint, is not sufficient to authorize a recovery upon the undertaking. (*Id.*)

SURROGATE.

1. Where a *surrogate* has jurisdiction to prove a will, he is vested with all the powers incidental and usual for the exercise of such jurisdiction; and it is competent for him to permit any person claiming an interest in the estate affected by the will, to intervene and contest its due execution, or show that it should not be admitted to probate. And this court will not, in a proceeding by a new action, arrest him in the exercise of the powers vested in him, or control him in the manner in which they shall be exercised. (*Lawrence agt. Parsons*, ante 26.)
2. Where duly admitted contestants of a will, claiming, as heirs-at-law of the testator, file objections to its validity on their behalf, by which it is insisted that it has not been executed according to law; or, if it has, then that it has been revoked, and an issue, by a denial of these allegations, has been raised, the determination of which, with the question as to the fact whether those contestants are heirs-at-law of the testator, is likely, in the judgment of the surrogate, to occupy considerable time, it presents a case where the surrogate clearly has the power, in his discretion, to *issue special letters of administration*, authorizing the preservation and collection of the goods of the deceased. (*Id.*)
3. This court cannot, except on a review upon appeal, inquire into or call in question the validity of the surrogate's appointment of an administrator or collector, on the ground that he has failed to comply with the directory provisions of the law prescribing his duty, as among others, in reference to the sufficiency of the sureties, and the amount in which the security should be given, in cases where he has become possessed of the jurisdiction to make such appointment. On the contrary, the omission to comply with these requirements would not render the proceedings void. (*Id.*)
4. A surrogate has no power to order an execution to issue upon a judgment recovered against an executor for a debt of the deceased, unless it has

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- been ascertained by an accounting what sum is properly applicable to the payment of the judgment; and the execution can then only be issued for the sum so applicable. (*Mitchell* agt. *Mount*, 17 Abb. 255.)
5. The surrogate, in proceedings before him, may award costs to be taxed, but he has no power to make an arbitrary allowance for counsel fees; and such counsel fees as may be taxable are to be allowed to the party, and not to his counsel. (*Devlin* agt. *Patchin*, 36 N. Y. R. 441.)
 6. The act of March 23, 1850, for the protection of purchasers of real estate upon sales made by order of surrogates, throws upon the party seeking to impeach a sale of real estate under the decrees of a surrogate the whole burden of the proof; and if he fails to show a want of jurisdiction in the surrogate to make the order, the law presumes that it was properly made. (*Wood* agt. *McCheesney*, 40 Barb. 417.)
 7. The surrogate may make the order of sale upon the petition of the creditors, under the provisions of the act of 1837, ch. 460 (*Laws of 1837*, p. 536), although all the administrators have not united in making and returning an inventory of the estate. (*Id.*)
 8. Where, in the supreme court, a recovery is had against an administrator, after a trial at law on the merits, for services rendered by the plaintiff as proctor and counsel for the administrator, in the administration of the estate, such recovery adjudges that such services constituted actual, necessary, just and reasonable expenses of the administration, which must be borne by the estate. And the surrogate has power to order the administrator to pay the amount of the judgment, although there are not sufficient assets to pay the same and all the debts of the intestate which constitute claims against his estate in full. (*Matter of the estate of Thompson*, 41 Barb. 237.)
 9. The surrogate has the same power to direct that an execution be issued upon a judgment recovered against an administrator for liabilities incurred by him in the administration of the estate, as he has to order such process to issue upon a judgment recovered for a debt owing by the deceased. And it is his duty so to order, if the creditor shall require it. (*Id.*)
 10. The legislature by repealing the provisions of the Revised Statutes, declaring that no surrogate shall, "under any pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by some statute of this state," intended that a surrogate should have the incidental power to open or correct a decree made through fraud or a mistake as to a material fact. (*Dobbs* agt. *McClure*, 41 Barb. 491.)
- See EXECUTORS AND ADMINISTRATORS, 1, 2, 8, 9, 10.
See APPEAL, 23, 29.
- ### TAXES AND ASSESSMENTS.
1. The notice required by the 19th section of the act prescribing the manner in which assessments of taxes are to be made (1 R. S. 393), to be given by the assessors of the completion of the assessment roll, and the opportunity thus afforded to tax-payers of having errors in the roll corrected, is essential to the validity of the tax, it being one of the things to be done by the assessors to obtain jurisdiction over the subject. (*Wheeler* agt. *Miller*, 40 Barb. 644.)
 2. Where it appeared that notices were posted only five days before the time specified therein for the service of the roll, instead of the twenty days specified in the statute: Held that the assessment was unauthorized and void, and that a sale of land for an unpaid tax conferred no title upon the purchaser. (*Id.*)
- ### TENDER.
1. S. sold a canal boat to H. for \$2,400, a part of which was paid down, and the balance was secured by the promissory notes of H. payable at future periods. H. was to have possession of the boat, but the title was to remain in S. until the notes were paid. In April, 1860, some of the payments due from H. being in arrear, S. directed the boat to be sold at auction. He had previously waived the technical forfeiture arising from failure to pay at the day by accepting a payment from H., and by treating him as a purchaser still holding under his contract. Previous to the sale H. tendered to S. the amount due upon the contract. Held, that such tender was equivalent to performance by H., and the effect of it

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was to take away from S. the right to proceed and sell the boat as upon a forfeiture, and to put H. in the position he occupied before any forfeiture could be claimed. (*Hutchings* agt. *Munger*, 41 Barb. 396.)

2. Held also, that S. occupied substantially the position of a mortgagee or pawnee of the property, and upon H's failure to pay, he had a right to resume possession and sell the property—a right equivalent to that of foreclosure by a mortgagee or sale by a pawnee; but that right could be defeated by a performance, or an offer and tender of performance, before or after the stipulated day; such a tender standing in the place of, and being equivalent to performance. (*Id.*)

3. Held further, that H. was by his tender, remitted to his original rights, and entitled to the possession of the boat, in the same manner that he would have been upon an actual performance. And that the sale of the boat by S. was improper, and the dispossession of H. illegal. (*Id.*)

TITLE.

1. An ordinary invoice or bill of sale, which states in terms that the purchaser has bought of the vendors certain articles or goods at certain prices, and which accompanies the delivery of the goods to the purchaser, cannot be contradicted by parol evidence showing that the invoice was delivered in pursuance of a previous parol agreement between the parties that the goods were to be delivered to the purchaser as the agent of the vendors, and to be sold by him on commission; and that the title of the goods was to remain in the vendors, with a right to retake them at any time on non-payment of the sales as per agreement. The property held liable to seizure and sale on execution against the purchaser in possession. (*Bonesteel* agt. *Flack*, ante 310.)

2. And it seems that the possession of the property in this case—liquors and wines to be sold at retail—being inconsistent with the continued ownership of the vendors, the transaction will be presumed fraudulent as against purchasers and creditors. (*Id.*)

3. Where the complaint set forth an agreement whereby the plaintiff agreed to purchase of the defendants certain real estate—\$250 were to be paid on

the execution of the agreement, and the balance on the delivery of the deed—and then set forth the following clause: "If the counsel for the party of the second part shall not find the title good and sufficient, this agreement shall be void, and the parties of the first part shall return the said \$250." (*DeLafield* agt. *James*, ante 357.)

4. Held, the plaintiff having commenced his action to recover back the \$250 of the defendants, upon his counsel not finding the title good, that the defendants were concluded by the terms of the agreement from drawing in question wherein the title was insufficient. (*Id.*)

5. In an action to recover possession of lands, the plaintiff must recover on the strength of his own title, not merely on the weakness of the defendants. To recover a strip of land lying along a boundary line, it is not enough for the plaintiff to show, that the defendant's lot as possessed by him, is wider than the deeds under which he claims describe it to be, by the width of the disputed strip. (*Brady* agt. *Hennion*, 8 Bow. 528.)

6. In an action for trespass on land, where the plaintiff proves title in himself, and at least a constructive possession, and that the defendant had knowledge that he was cutting timber on the plaintiff's land; and there is no evidence to show any right in the defendant, and no connection with a stranger who claimed title—the defendant, being a mere intruder, cannot prove title in a third person for the purpose of defeating the action. (*Miller* agt. *Dexter*, 40 Barb. 228.)

7. But evidence that another person is in possession is admissible, for the purpose of rebutting and contradicting the evidence given by the plaintiff of constructive possession in himself; although such possession in a stranger is not set up as a special defence in the answer. (*Id.*)

8. One who has entered into possession of land under a parol contract for the purchase and conveyance thereof, and has remained in possession ever since, and has fully performed the agreement on his part, by paying the stipulated price, he will be regarded as the owner of the land; and on a bill filed for that purpose would be entitled to a decree for a specific performance, and for the execution and delivery of a deed from

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the vendor, if living, or his heirs, or devisees, if he be dead. (*Trophagen* agt. *Trophagen*, 40 Barb. 537.)

9. The rule in equity is that, as between two parties having equal equities, the prior equity must prevail; but if the party having the subsequent equity clothes himself with the legal title before he has notice of the prior equity, such legal title must prevail. (*Newton* agt. *McLean*, 41 Barb. 285.)

See MORTGAGE, 6, 7.

See EXECUTORS AND ADMINISTRATORS, 5, 6, 7.

See FRAUDULENT TRANSFER OF PROPERTY.

See ADVERSE POSSESSION.

See CONTRACT, 12, 13, 14, 15, 16, 17.

See ATTACHMENT, 1.

See DEED, 4, 5, 6.

See DEFENCE, 5.

See SLANDER, 1, 2, 3, 4.

TRIAL.

1. In an action for an accounting in respect to partnership transactions, both as to real and personal property, neither party has an absolute right to a trial by jury. The right to a trial by jury in civil cases is waived by entering on the trial before the court alone, without objection. (*Moffat* agt. *Mount*, 17 Abb. 4.)
2. Where the defendant has had the cause reserved generally, that fact does not make it his duty to keep it upon the calendar. If the plaintiff suffers it to go off the calendar, the defendant may move to dismiss the action for neglect to prosecute. In such case, where the motion is denied on the plaintiff's showing sufficient excuse, the terms imposed should be payment of defendant's costs from the time at which plaintiff suffered the cause to go off the calendar. (*Corbett* agt. *Claffin*, 17 Abb. 418.)
3. After a judge, at the circuit, has heard the plaintiff's testimony, and decided the case on the merits, dismissing the complaint, he cannot destroy the effect of that decision by amending the judgment so as to give the plaintiff leave to bring another action. (*Bostwick* agt. *Abbott*, 40 Barb. 331.)

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

See COMPLAINT, 14.

See ANSWER, 8, 9, 10, 11, 12.

See JURORS, 1.

See REFERREES AND REPORTS, 15.

TRUSTEES.

1. Where trust money has been, by the trustee, so appropriated to his own use as to be undistinguishable from his individual means, his creditors, and especially those who have been misled by acts of his, inconsistent with the existence of a trust, are entitled to reach the trust money as his. Although the right of *cestuis que trust* are more properly to be determined in an action by or against the trustee, yet the court will, in proper cases, allow them to come in and assert their claims. (*Willatt* agt. *Stringer*, 17 Abb. 152.)
2. An insurance company transferred to the plaintiffs, as trustees, a promissory note as a security for the liabilities of persons who had lent their credit to the company, with power to sell the note, at public or private sale, without notice: *Held*, that this power of sale did not take away the power which the trustees took by the mere transfer of the note to sue upon it in their own names, without joining the *cestuis que trust*. (*Nelson* agt. *Eaton*, 26 N. Y. R. 410.)
3. *It seems* that, had the trust deed contained an express agreement not to sue this would have been unavailable to the maker of the note—he having no interest in the trust: *Per Selden, J.* (*Id.*)
4. An insurance corporation, in the absence of any statutory restriction, has the power to borrow money, and, as incident thereto, the power to transfer its assets in trust for the security of the lenders. (*Id.*)
5. It appearing, by the complaint, that several other notes were transferred to the trustees at the same time, and their value not being stated, it will not be assumed on demurrer that the amount exceeded \$1,000, nor that the transfer was made without a previous resolution of the directors, in violation of the statute (1 R. S., p. 501, § 8). (*Id.*)

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6. Where a subscription paper for the erection of an institution of learning, provided that the moneys subscribed should be paid to the treasurer of a board of trustees which might be elected by the Wayne County Baptist Association, at a convention then called to meet at Marion on the 30th of May. (*Wayne and Ontario Collegiate Institute* agt. *Greenwood*, 40 Barb. 72.)

7. *Held*, that the obligation of a subscriber did not become inoperative by the omission of the convention to choose trustees at the place and on the precise day mentioned; but that an election of trustees by the convention, not at that time or place, but on a subsequent day to which the convention had been adjourned after meeting at Marion, on the day named, was a substantial compliance with the stipulation of the subscription. (*Id.*)

See BOARD OF EDUCATION.

See EXECUTORS AND ADMINISTRATORS, 4.

USURY.

1. In an action by the receiver of a banking corporation against the indorser of a note, an answer alleging that the bank of which plaintiff is receiver, discounted the note (for \$500, payable in three months from its date), upon a corrupt agreement against the form of the statute, that the defendant should receive \$300, and leave the remaining \$200 in the bank until the note became due, then to be applied towards its payment, sufficiently states the defence of usury. The allegation that the note was discounted (unaccompanied by other averments), imports a discount at a legal rate of interest, for the time the note then had to run. If the plaintiff desired more specific details, his remedy was by motion. (*Butterworth* agt. *Pecare*, 8 Bosw. 671.)

2. Where it is proved that the bank discounted the note of \$600 at the full legal rate for the time it had to run, and required the indorser to give them his check for \$200, in pursuance of an agreement to that effect, on which it was discounted, and the next day charged this check against the credit given on the discount of the note, a verdict finding usury should be sustained. Upon such facts it would be proper to instruct the jury to find for the defendants. (*Id.*)

3. When a contract for the loan of money, legal and innocent in itself, is once made and consummated, it cannot be made usurious and illegal by any subsequent transactions of the parties. (*Lesley* agt. *Johnson*, 41 Barb. 286.)

4. Where subsequent to the execution of a bond and mortgage, the mortgagors made an agreement with B that if he would pay the money due thereon, to the holder of the mortgage, take an assignment thereof, and execute a covenant extending the time of payment, they would pay him a bonus of \$4,365-55, which was acceded to by B, and was carried into effect by both parties: *Held* that the subsequent usurious agreement did not taint the mortgage with usury, or constitute a defence to an action to foreclose the same, brought by an innocent purchaser thereof. (*Id.*)

5. The statute which authorises a party paying usurious interest for the loan or forbearance of money, to sue for and recover the excess, within one year next after such payment is cumulative, and does not take away the common law remedy of the borrower to recover such excess in an action for that purpose, which may be brought at any time within six years. (*Porter* agt. *Mount*, 41 Barb. 561.)

6. Where an accommodation promissory note is made in this state and payable here, but is first negotiated in the state of Connecticut, the laws of New York must control as to the defence of usury upon it. (*Jewell* agt. *Wright*, ante 481.)

See DEFENCE, 6.

See COUNTER CLAIM, 3.

VARIANCE.

1. In an action on contract for the recovery of money, in which the complaint charged the defendant as agent and surety for the plaintiff, and with not accounting and paying over; the answer alleged that the transaction was a joint adventure and the referee so found: *Held*, that it thus appearing, the defendant was indebted substantially as alleged in the complaint, the action should not be dismissed for this variance. (*Petrar* agt. *Fisher*, 8 Bos. 258.)

See COMPLAINT, 1, 2, 3, 13.

See WAIVER, 2, 3, 4.

See ANSWER, 4.

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WAIVER.

1. *It seems* that a motion to dismiss an appeal on the ground that the appeal was brought after the time allowed by law for bringing appeals had expired, may be waived by laches in moving. (*Stevenson* agt. *McNitt*, ante 335.)
2. Previous to the Code, the non-joinder of a co-promisor could be taken advantage of only by plea in abatement. (*Lee* agt. *Wilkes*, ante 336.)
3. Since the Code, a defect of parties can only be taken advantage of by demurrer, when apparent on the complaint, or when not, by answer. (*Id.*)
4. Although the proof may show a joint liability of the defendant with another, and thus may constitute a variance, yet if the objection is not taken in the mode pointed out by the Code, it is one which the defendants shall be deemed to have waived. (*Id.*)
5. Serving notice of trial is not a waiver of a previous notice to strike out the answer in the action as sham or false. (*Beche* agt. *Marvin*, 17 Abb. 194.)

See APPEAL, 24, 25.

See FRAUDULENT TRANSFER OF PROPERTY, 17, 18, 19.

WILL.

1. Upon a trial involving the question of the mental imbecility of a testator or grantor, a non-professional witness cannot be asked the broad question whether he considered the party *non compos mentis*, or which is the same thing, incapable of managing his affairs. (*Deshon* agt. *Merchants' Bank*, 8 Bos. 461.)
2. The provision of the Revised Statutes in relation to the probate of a lost will in the court of chancery (2 R. S., p. 68, § 67), requiring two witnesses to establish it, relates only to that special proceeding, and does not abolish the common law rule of evidence which allowed the proof of a lost will, in the same manner as that of a deed, by a single credible witness. (*Harris* agt. *Harris*, 20 N. Y. R. 433.)
3. Accordingly, where, in an action of partition, the plaintiffs established their title by sufficient common law evidence of the existence and fraudulent destruction of a will, *held*, that they were not concluded by the dismissal of a suit in which they had sought to obtain the probate and record of the will under the statute. (*Id.*)
4. A testator by the fourth clause of his will, devised as follows: "I give and devise to my son-in-law, J. M., the house and lot I now occupy, &c., to be used and enjoyed by him during the term of his natural life, and from and immediately after his decease, I give and devise the same to S., the daughter of said J. M., her heirs and assigns forever. It is my wish, however, that so long as the house shall remain in the actual occupation of said J. M., and his sister E. H. shall remain a widow, and otherwise unprovided for, the said E. H. shall have the free and full use of the east chamber thereof, for her sole and individual purpose; but nothing herein contained shall be construed to prevent the said J. M. from selling the said house and lot, and giving full possession thereof, whenever his and his daughter's interest may be promoted thereby: *Held*, that the testator did not intend to confer upon J. M. the power to sell in fee, but only limit E. H.'s right to the possession of the east chamber in the event of J. M.'s selling or leasing his life estate. And that S. took a vested remainder in fee, which, upon her dying intestate, descended to her only child and heir-at-law, and upon the death of J. M., the tenant for life, such remainder became a fee simple absolute. (*Carter* agt. *Hunt*, 40 Barb. 89.)
5. Under the provisions of the Revised Statutes a will, where it disposes of real or personal property, speaks as of the time of the testator's death. (*McNaughton* agt. *McNaughton*, 41 Barb. 55.)
6. Where a testator devises all his real estate, in express and unambiguous words, he will be deemed to have reference to the real estate as it shall exist at the time of his death. (*Id.*)

WITNESSES.

1. Where the plaintiff, by his own oath, proved that he worked for the defendant 21 days as a carpenter and joiner, for which he had not been paid, and that his services were worth \$2 per day: *Held*, that it was fair to assume that the plaintiff was a carpenter and joiner, and that he worked at defendant's request as such; from which it

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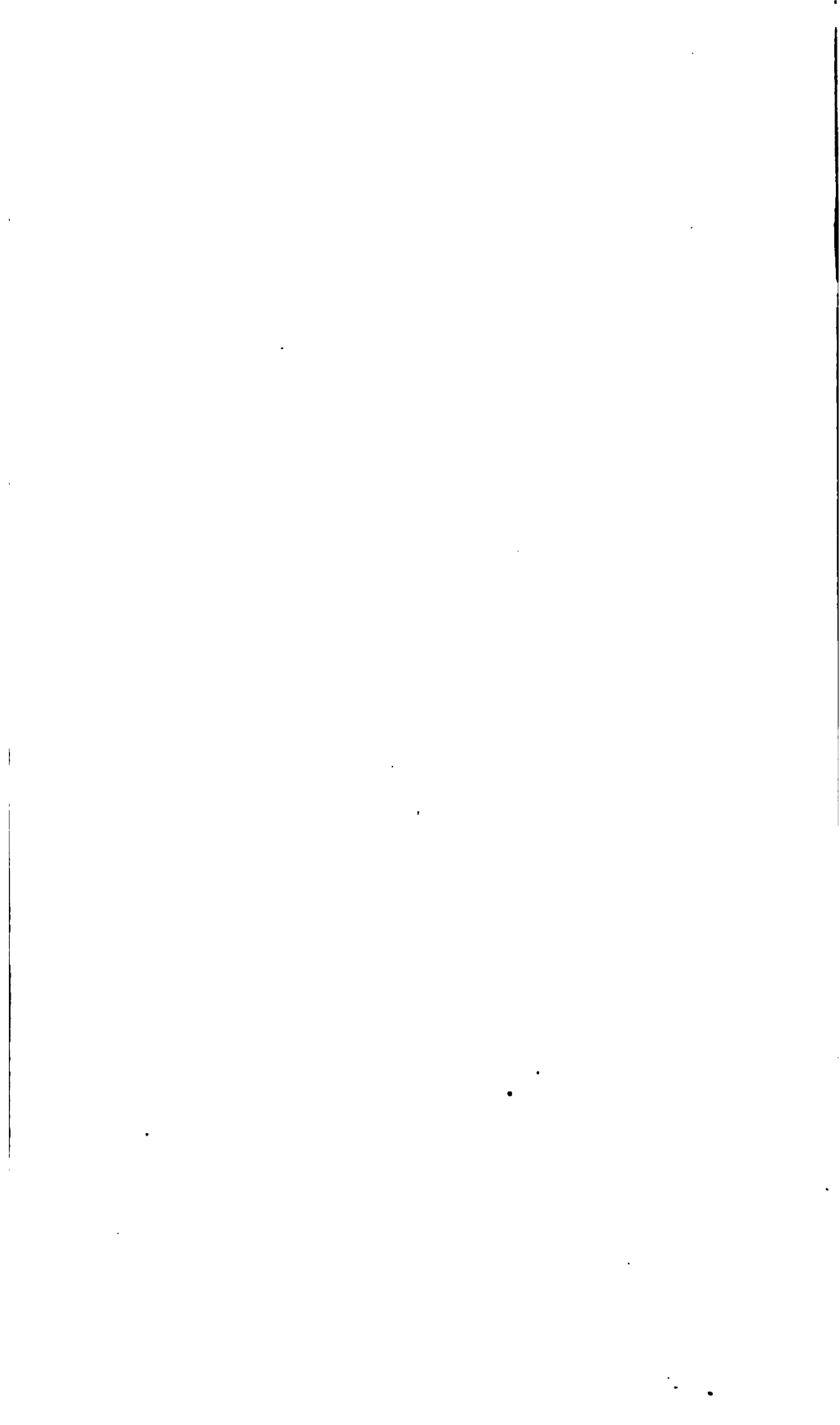
- must be inferred that he was of that trade and calling, and so must be presumed to have been competent to give his opinion of the value of his own services in such trade. (*Potter* agt. *Whitaker*, ante 10.)
2. No costs will be taxed for the attendance and travel fees of foreign witnesses at previous circuits, where they have all disappeared when the cause was tried. (*Mead* agt. *Mallory*, ante 32.)
 3. And in allowing the fees of home witnesses who attend at the trial, and who reside but a short distance from the court-house in the same county, any travel fees for such witnesses charged as having been subpoenaed and traveled from a far distant county, will be stricken out. If they were temporarily called away from home on business, they should have been subpoenaed in due time. (*Id.*)
 4. A witness is not liable in an action for a penalty, for non-attendance on the trial of a cause, where it appears that the witness was at court on Tuesday, the day it commenced, and was paid his *per diem* fees from Wednesday to Saturday inclusive, and on Friday afternoon went home, a distance of thirteen miles (the court adjourned from Saturday until Monday); and on Saturday evening, at the residence of the witness, the party subpoenaed him, and offered him fifty cents as his *per diem* for the next Monday, which the witness refused, and neglected to appear on Monday, the day the cause was tried. (*Muscott* agt. *Runge*, ante 58.)
 5. 1st. The witness was entitled to his fees for his attendance on Sunday, as well as the other days of the week, during the sitting of the court; and the tender made by the party was only sufficient for Sunday. (*Id.*)
 6. 2d. If the party did not choose to consider the witness as in actual attendance on the court, and entitled to pay for what the law allows for his support as a witness, he should have suffered the witness to depart, and paid him his mileage going and returning, and fees for his attendance on the day he was wanted. (*Id.*)
 7. The original service of the subpoena was defective in two particulars. 1st. No writ of subpoena was shown the witness. 2d. Nothing was paid or tendered for travel. (*Id.*)
 8. To entitle a plaintiff to recover in an action of this kind, he is bound to prove: 1st. That an action was pending in which the defendant might be a witness. 2d. That a subpoena was issued to be served on him. 3d. That it was served by delivering to the defendant personally, a ticket containing the substance of the writ, showing him at the same time the original, and paying the fees required by law to be paid, to wit: eight cents per mile from the place of residence of the witness to the place of holding the court, and fifty cents for one day's attendance. 4th. That fifty cents was paid to the witness for each day's attendance after the first. 5th. That he was a material witness. 6th. That he was called when the cause was reached on the calendar, and did not appear. 7th. The damages sustained by the non-attendance of the witness. (*Id.*)
 9. Husband and wife are not in general admissible as witnesses for and against each other. (*Moffat* agt. *Mount*, 17 Abb. 4.)
 10. It is improper to ask a witness what he supposed, at the time, was the effect of a transaction, or to ask what impression was produced upon his mind by what passed. The question should be what was said or done. (*Weber* agt. *Kingsland*, 8 Bow. 415.)
 11. The objection that a question, put on examination *de bene esse*, was a leading question, cannot, it seems, be raised at the trial, for it is in the discretion of the judge taking such examination to permit a leading question when necessary. (*Id.*)
 12. A deposition, taken on commission, issued at the instance of one party, may be read in evidence by the other party at the trial, although the former refuses to read it. (*Id.*)
 13. An order for the examination of the adverse party, under § 391 of the Code, is allowed as a matter of right, upon proof that the action is at issue, and that the applicant desires such examination as to matters material to the issue. (*Cook* agt. *Bidwell*, 17 Abb. 300.)
 14. As a general rule, opinions of witnesses as to damages sustained by one person from the conduct of another, or occurrences for which he is responsible, are inadmissible, although stated with the facts on which they are founded, even when such facts are

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- proved by other witnesses to have attended the occurrence complained of. Opinions of the value of articles may be given by those familiar with the identical articles, or similar ones. But whenever the value of the subject to be estimated is uncertain and varying, the witness can only give the elements of value as facts, and leave the jury to make their own estimates. (*Bankard* agt. *Babcock*, ante 391.)
15. The questions put to the witnesses, or some of them, in this case, as to the deterioration in value of the premises, were inadmissible upon several grounds; 1. The evidence did not establish that the dampness referred to arose from the evil covenanted against. (*Id.*)
16. The failure to establish that the witnesses, whose opinions were sought, were experts in the effect of dampness in cellars upon the rent of stores. (*Id.*)
17. If such questions were intended to elicit the opinions of witnesses as to the value of the probable extent of injury to the goods and business of the defendants, it was substituting the witnesses in place of the jurors, who alone are the judges of the facts. (*Id.*)
18. If such questions were intended to elicit the opinions of witnesses as to a loss in the market value of the store, they were premature, until it was shown that dampness in cellars depreciated such value; and if it had been shown, the defendants could not lose what, by the terms of the lease, they had no right to gain. (*Id.*)
19. Where the credit of a witness has been impeached by the production of a record of his conviction of the crime of larceny, it is not competent for the party calling him to give evidence explanatory of the conviction, and in favor of the innocence of the witness notwithstanding the conviction. *E. DARWIN SMITH*, J. dissented. (*Gardner* agt. *Bartholomew*, 40 Barb. 325.)
20. The exclusion of the testimony of a party in his own behalf, in respect to a transaction between him and a deceased person, against the executors of the latter, specified in section 399 of the Code, extends only to evidence of that character when offered against a party who has acquired title to the cause of action *immediately* from such deceased person, and not where the party has acquired such title from the decedent *mediately* or remotely. In all other cases parties are competent to testify to such facts as much as to any other. (*Id.*)
21. The testimony of a person employed by a mortgagee as his attorney and legal adviser at the time of taking a mortgage, in respect to the terms of the bargain, between the mortgagors and the mortgagee, upon which the bond and mortgage were executed, is not liable to the objection that the bargain thus made was in the nature of a privileged communication between attorney and client. (*Id.*)
22. It was always competent to prove the loss or destruction of a paper, for the purpose of admitting parol evidence of its contents, by the party himself; and there is no provision of the code that operates to the exclusion of a party thus testifying. (*Williston* agt. *Williston*, 41 Barb. 635.)
23. A plaintiff, in an action against executors, is a competent witness to prove the contents of a lost letter. Section 399 of the code of procedure was intended to provide for the case of personal intercourse, conversations or communications had personally with the deceased, and it is not applicable to testimony resting in papers or document of any description. (*Id.*)
- See WILL, 1.
- See CONTRACT, 7.
- See EVIDENCE.
- See NEGLIGENCE, 2, 3.

WRIT OF PROHIBITION.

1. The writ of prohibition issues out of this court to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction. Where a court of oyer and terminer has jurisdiction touching contempt, this court has no right to interfere touching the practice of that court, by writ of prohibition or otherwise. (*People ex rel. Greeley* agt. *Court of Oyer and Terminer*, ante 14.)



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COURT OF APPEALS.

DECISIONS RENDERED JUNE, 1864.

Judgments affirmed.

Newson agt. Shultz; Tilley agt. Hudson River Railroad Company (23 How., 363.)
Payne agt. Gardner; Watts agt. Garcia (40 Barb., 656.)
Wilds agt. Hudson River Railroad Company (23 How., 492 and 33 Barb., 503.)
Dodge agt. Crandall; Stanbury agt. Galway; Roth agt. Wells (41 Barb., 194.)
Dobson agt. The Commissioners of Emigration; Crichton agt. The People.
Courtwright agt. The People; Dubois agt. Baker (40 Barb., 556.)
Seward agt. Tompkins; Bedford agt. Terhune (27 How., 422); Reed agt. Randall.
Brainard agt. Dunning; Talmadge agt. Hunting (39 Barb., 654.)
Garlinghouse agt. Jacobs; Kniffin agt. McConnell.
Harris agt. Moody (4 Bosw., 210); Ashley agt. Marshall (19 How., 110.)
Bullard agt. Raynor; Buffalo City Bank agt. Northwestern Insurance Company.
Wells agt. Marsh; Leavy agt. Roberts (2 Hill, 285 and 9 Abb., 310.)
Cook agt. Smith; Cook agt. Wilson; Cook agt. Potter.
Mulhade agt. Brooklyn City Railroad Co; Adams agt. Leeland (5 Bosw., 411.)
Mahaive Bank agt. Culver; North agt. Bloss; Bridge agt. Weeks.
Siddle agt. The Market Fire Insurance Company; Dunham agt. Pettes.

Judgment affirmed with ten per cent damages.

Bergen agt. Wemple; Carpenter agt. Ward.

Judgment affirmed with five per cent damages.

Thompson agt. Kinsell.

Judgment reversed, and record remitted to Oyer and Terminer.

Ratsky agt. The People.

Order affirmed, and judgment absolute for defendant.

Macy agt. Wheeler; Gregory agt. Deyo.

Order reversed, and judgment at special term affirmed.

Birdsall agt. Russell; Manufacturers' and Traders' Bank agt. Hazard.
Goodal agt. Tuttle; Ball agt. Loomis.

Appeal dismissed without costs.

Johnson agt. Johnson (24 How., 181.)

Motion to amend judgment granted, without costs.

Downing agt. Marshall (23 How., 4.)

Appellant allowed to dismiss his appeal on payment of costs in this Court and Supreme Court.

Haskall agt. Haddock.

Decisions Court of Appeals.

Appeal dismissed with costs.

Harding agt. Barney (7 Bosw., 353); In the matter of John M. Dodd.

Motion to discontinue appeal granted on payment of costs of opposing.

Robbins agt. Dillaye (33 Barb., 77.)

Judgment reversed and new trial ordered.

Sumner agt. The People; Whiting agt. Barney (38 Barb., 393.)

Bulson agt. Lohnes; New York Dry Dock Company agt. Stillman.

Wood agt. Wellington; Du Peirat agt. Wolfe.

Van Deusen agt. Young (29 Barb., 9); Jewell agt. Wright (12 Abb., 55.)

Judgment reversed and that of county court affirmed.

Peters agt. Purdy (23 How., 328 and 35 Barb., 239 and 15 Abb., 160.)

Judgment reversed, without costs of appeal.

Everett agt. Everett (41 Barb., 385, and 29 Barb., 112.)

Judgment reversed and judgment for plaintiff on demurrer, with liberty to defendant to answer on paying costs.

Walton agt. Walton (20 How., 347 and 33 Barb., 303.)

Submitted.

McGregor agt. McGregor.

Motion to dismiss appeal granted with costs.

In the matter of J. M. Dodd.

Motion to discontinue appeal granted on payment of costs of appeal and of opposing the motion.

Robbins et al. agt. Dillaye et al. (33 Barb., 77.)

Motion allowing appellant to dismiss his appeal granted, upon payment of respondent's costs in this Court and in Supreme Court.

Haseall agt. Harris.

Motion to dismiss appeal granted with costs.

Harding agt. Barney (7 Bosw., 353.)

SEPTEMBER TERM 1864.

Judgments affirmed, with costs.

Halliday et al. agt. Hart et al.; Wehekamp agt. Willett, administrator, &c.

Clapp, administrator, &c., agt. Meserole et al. (38 Barb., 661.)

Lewis et al. agt. Ingersoll et al.; Chambers, executor, &c. agt. Clearwater et al.

Elwell et al. agt. Chamberlain (4 Bosw., 330 and 2 Bosw., 230.)

Henick et al. agt. Ames et al.; Lane agt. Lutz et al.

Bucklin agt. Bucklin et al. (8 Abb., 307.)

McKeon agt. Tillotson; Read et al. agt. Spaulding.

Partridge et al. agt. Gildermeister (6 Bosw., 57.)

Brown et al. agt. Bowen, impleaded, &c.; Ross agt. Curtis; Gould agt. Curtis.

Van Vechten agt. Griffiths et al.; Smith agt. Knapp, late sheriff.

Hall et al. agt. The City of Buffalo; Wilcox agt. Hawley et al.

Van Buskirk agt. Roberts (14 How., 61.)

Sheldon et al. agt. Chapman et al.; Deway, survivor &c. agt. Hotchkiss.

Decisions Court of Appeals.

Spoor agt. Chappell *et al.*; Smith agt. Countryman.
 Van Buren and wife agt. Dash *et al.*; Stebbins *et al.* agt. Howell.
 Michaels *et al.* agt. The N. Y. C. Railroad Company.
 The People *ex rel.* Ostman agt. Hinds *et al.* (27 Barb., 294.)
 Pike agt. Nash *et al.*; White agt. Lester *et al.*
 Nellis agt. The N. Y. C. Railroad Company; McGregor agt. McGregor.

Judgment reversed and new trial ordered, costs to abide the event.

Enders *et al.* agt. Sternbergh *et al.*; Becker agt. Forrence; McKown agt. Hunter.
 Van Allen agt. Felts (23 Barb., 139 and 9 Abb., 237.)
 Roach agt. N. Y. and Erie Insurance Company; Bullock agt. Weeks *et al.*
 Snyder agt. Plass; Babcock *et al.* agt. Utter *et al.*

Order of the General and Special Terms reversed with costs.

Acker agt. Acker.

Order granting new trial affirmed and defendant relieved from his stipulation for judgment absolute, and ordered that a new trial be had pursuant to order, costs to abide the event.

Lowman agt. Yates, administrator, &c.

Order appealed from affirmed, with costs.

Frost, executor, &c. agt. Coon, *et al.*

Order of General Term reversed, and judgment, on report of referee, affirmed, with costs.

Ogdensburgh, Clayton and Rome Railroad Company agt. Wooley.

Judgment affirmed, without costs of the appeal in this Court to either party.

The British Com. Life Ins. Co. agt. The Commission's of Taxes, &c., in New York.

Order affirmed and judgment absolute for defendant, with costs.

Briggs *et al.* agt. Sizer.

Judgment reversed and judgment for defendant, with leave to plaintiff to amend on payment of the costs of the Supreme Court and of this Court.

Conklin *et al.* agt. Gandal.

Order of the General and Special Terms reversed with Costs.

Clements agt. Middletown Bank; Ryder agt. same; Carpenter agt. same.

Order of General Term reversed, and judgment of Special Term affirmed with costs.

The People agt. Tuthill *et al.*

Judgment affirmed as modified in opinion of Denio, C. J., and judgment to be settled by him without costs of this appeal to either party.

Hartley agt. Tatham and wife.

Order granting new trial reversed as to the defendants, White & Miller, and judgment on verdict as to them affirmed with costs, and order affirmed as to defendant Faysen, and judgment absolute in his favor against the plaintiff, with costs.

Jessup *et al.* agt. White *et al.*

Order appealed from affirmed and judgment absolute for defendant, with costs.

McIntyre *et al.* agt. Clapp.

Order granting new trial reversed and judgment, on report of Referee, affirmed, with costs.

Merrill agt. Grinnell *et al.*

Decisions Court of Appeals.

Judgment of Supreme Court reversed, and judgment of County Court and Justice affirmed, with costs.

Ackley et al. agt. Tarbox et al. (29 Barb., 512.

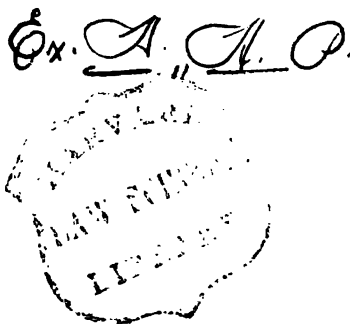
Re-argument ordered.

*Kirby et al. agt. Collins et al.; The Commissioners of Excise agt. Sacridier.
Peterson agt. Rawson; Merritt agt. Carpenter; Southworth agt. Payne et al.*

Judgment with costs, with ten per cent damages.

Murray agt. Alvord; Kerr, administrator, &c. agt. McGuire.

Applications for copies of opinion must be addressed to the State Reporter at Pittsford, Monroe county.



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HARVARD LAW

